BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")

(AB-2006-2)

APPELLEE SUBMISSION OF THE UNITED STATES OF AMERICA

February 13, 2006

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SERVICE LIST

OTHER PARTY TO THE DISPUTE

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TABLE OF CONTENTS

Table of Reports

Short Form	Full Citation
Panel Report	Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R, circulated 31 October 2005
Argentina – Footwear (AB)	Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles Apparel and Other Items*, WT/DS56/AB/R, adopted 22 April 1998
Argentina – Footwear Safeguard (AB)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000
Argentina – Poultry	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003
Brazil – Aircraft (AB)	Appellate Body Report, *Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999
Canada – Wheat Exports (AB)	Appellate Body Report, *Canada - Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004
Dominican Republic – Cigarettes (AB)	Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005
EC – Audiocassettes	Tokyo Round Panel Report, *European Communities – Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan*, ADP/136, circulated 28 April 1995 (panel established under the 1979 *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* (unadopted)
EC – Bed Linen (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001
EC – Bed Linen (Article 21.5) (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003

EC – Cast Iron Fittings (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003
EC – Poultry (AB)	Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998
EC – Sugar Subsidies (AB)	Appellate Body Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/R, adopted 19 May 2005
Egypt – Rebar	Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted 1 October 2002
Indonesia – Autos	Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry,* WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, adopted 23 July 1998
Japan – Alcohol (AB)	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages,* WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November, 1996
Korea – Dairy Safeguard (AB)	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000
Korea – Paper	Panel Report, *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia*, WT/DS312/R, adopted 28 November 2005
US – 1916 Act (AB)	Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000
US – Carbon Steel (AB)	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R, adopted 19 December 2002
US – Corrosion-Resistant Steel Sunset Review (Panel)	Panel Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/R, adopted 9 January 2004, as modified by the Appellate Body Report, WTDS244/AB/R

US – Corrosion-Resistant Steel Sunset Review (AB)	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004
US – Cotton Subsidies (AB)	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005
US – Countervailing Measures (AB)	Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, adopted 8 January 2003
US – DRAMS AD	Panel Report, *United States – Anti-dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above From Korea*, WT/DS99/R, adopted March 19, 1999
US – FSC (AB)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000
US – Gambling (AB)	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005
US – Hot-Rolled Steel (AB)	Appellate Body Report, *United States – Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001
US – Lamb Meat (AB)	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001
US – Line Pipe (AB)	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002
US – OCTG from Argentina (AB)	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004
US – Salmon	Tokyo Round Panel Report, *United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*," ADP/87, adopted 30 November 1992 (panel established under the 1979 *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade*)

US – Section 211 (AB)	Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998,* WT/DS176/AB/R, adopted 1 February 2002
US – Softwood Lumber Dumping (AB)	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004
US – Steel Safeguards (AB)	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003
US – Wheat Gluten (AB)	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001
US – Wool Shirts (AB)	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. Although belied by the length of the submissions of the parties, the EC's appeal in this dispute is essentially about one issue – whether injurious dumping must be considered to be offset by non-dumped sales. The answer to that question is no.

2. To be clear at the outset, while the Appellate Body has dealt with a similar issue in the *EC – Bed Linen* and *US – Softwood Lumber Dumping* disputes, the issue in the present dispute is legally quite distinct. Those disputes involves investigations which examined prior periods of activity in which there was no antidumping duty in place. The purpose of the inquiry was to determine whether injurious dumping had occurred during that prior period.

3. Article VI of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") recognizes that dumping is the action by which "products of one country are introduced into the commerce of another country at less than the normal value of the products" and that injurious dumping "is to be condemned."[1] Article VI goes on to provide that a product "is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product [...] is less than the comparable price [...] for the like product ... ."[2] Article VI provides very little guidance as to how any of the prices are to be established and provides no guidelines for determining the product under consideration.

4. The *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") provides substantial, substantive guidance on the application of Article VI of the GATT 1994. In particular, it contains a number of disciplines on the conduct of antidumping investigations, providing for relative unity in the manner in which Members undertake those investigations. Among the disciplines provided in the AD Agreement is Article

[1] GATT 1994 Article VI:1.
[2] GATT 1994 Article VI:1.

2.4.2. Pursuant to Article 2.4.2, "the existence of margins of dumping during the investigation phase shall normally be established on the basis of" average-to-average or transaction-to-transaction comparisons between export price and normal value.[3]

5. In both *EC – Bed Linen* and *US – Softwood Lumber Dumping*, the investigating authorities had performed multiple average-to-average comparisons pursuant to Article 2.4.2. The Appellate Body confirmed that multiple comparisons were permissible pursuant to this provision. However, the Appellate Body also found that Article 2.4.2 provides that the comparisons must involve "a weighted average of prices of all comparable export transactions." In fact, it found that because "all comparable export transactions" appears in the same sentence as "margins of dumping" in Article 2.4.2, it emphasized that "they should be interpreted in an integrated manner."[4]

6. The Appellate Body's integrated interpretation of "all comparable export transactions" and "margin of dumping" led it to Article VI:1 of the GATT 1994 and Article 2.1 of the AD Agreement which contains language similar to that of Article VI:1. Effectively, the Appellate Body found that, by providing additional disciplines on the manner in which prices are to be compared, Article 2.4.2 implicitly provided some discipline on the product involved, as well. In other words, it found that when using the average-to-average comparison methodology, the

[3] Throughout this submission, the United States refers to average-to-average, transaction-to-transaction, and average-to-transaction comparisons (or the targeted dumping methodology) to refer to the three comparison methodologies, respectively, provided in Article 2.4.2. This is merely intended as a shortened reference to the specific methodologies provided in Article 2.4.2. The United States does not intend to suggest any substantive alterations such that all references to averages in the comparisons should be considered as weighted-averages.

[4] *US – Softwood Lumber Dumping (AB)*, para. 85.

"product" necessarily included "all comparable export transactions" or, as the Appellate Body put it, "the product as a whole."

7. While the United States contested the EC's "as applied" claims with respect to certain investigations before the Panel, the Panel's findings regarding these claims faithfully take into account the conclusions and reasoning of *US – Softwood Lumber Dumping (AB)*. The United States is not appealing those findings.

8. While the Panel followed the reasoning of *US – Softwood Lumber Dumping (AB)*, the Panel also recognized the limitations of that reasoning, limitations that had been presented to the Appellate Body in that dispute and the recognition of which was consistent with the approach taken in that report. Specifically, both parties in that dispute, as well as the EC as a third party, recognized that the average-to-transaction comparison methodology provided in the second sentence of Article 2.4.2 would be rendered a nullity if "zeroing" were prohibited when using to that methodology. By linking its reasoning to the "all comparable export transactions" language of the average-to-average comparison methodology, the Appellate Body avoided such a result.

9. That is the starting point from which the Panel commenced its examination of whether "zeroing" is prohibited, or offsets are required, after the imposition of an antidumping duty. The Panel proceeded in a methodical fashion to determine whether there was any textual basis in the AD Agreement to find that, after an antidumping duty has been imposed, a Member would be required to recognize the extent to which an import was sold at above normal value and, to that extent, reduce the antidumping duty to be assessed as a result of other imports sold at below normal value. The Panel found no such obligation.

10. The analysis in this dispute properly begins where *US – Softwood Lumber Dumping (AB)* ended – Article 2.4.2 of the AD Agreement. To the extent that Article 2.4.2 has already been found to contain some obligations with respect to the treatment of sales at greater than normal value in the investigation phase, it is appropriate to determine whether those obligations extend beyond that phase.

11. The Panel found that they do not. The text of Article 2.4.2 plainly states that it speaks to the comparison methodologies applicable "during the investigation phase." While the EC proposed (without endorsing) as many as six alternative interpretations of this phrase, consistent with prior panel and Appellate Body reports, the Panel found that there is a distinct phase in an antidumping proceeding, characterized as the investigation phase, which precedes the imposition of an antidumping duty. The Panel found that the phrase "during the investigation phase" properly limits the scope of Article 2.4.2 to this investigation phase.

12. That Members would have agreed on particular comparison methodologies applicable only during the investigation phase, and not on methodologies applicable after the imposition of an antidumping duty, is not remarkable. The AD Agreement represents the latest step in a growing body of obligations applicable to investigations to determine whether the imposition of an antidumping duty is warranted and permissible.

13. There remains, however, much less convergence among Members regarding the methodologies to be applied after the imposition of an antidumping duty. In particular, Members maintain a variety of duty assessment systems: prospective normal value systems, prospective *ad valorem* systems, and retrospective duty assessment systems, just to categorize them at the broadest level of commonality. Obligations common to the investigation phase could not be

extended to the duty assessment phase without first achieving a degree of convergence in the duty assessment systems applied by the Members.

14. Having determined that Article 2.4.2 does not impose any obligations with respect to the issue of offsets, or "zeroing," beyond the investigation phase, the Panel considered whether there were any other sources of such an obligation. The short answer, again, is no.

15. As an initial matter, this is consistent with the interpretive problem faced by the Appellate Body in *US – Softwood Lumber Dumping (AB)*. The second sentence of Article 2.4.2 provides a comparison methodology that is an exception to the comparison methodologies provided in the first sentence of Article 2.4.2. It is not an exception to any other obligation of the AD Agreement. Consequently, if some other provision in the AD Agreement were to require a recognition of the extent to which some transactions exceed normal value, and that any dumping found be reduced by the amount of that excess, then that obligation would apply to the second sentence of Article 2.4.2 and would have the effect of nullifying it.

16. The Panel, however, did not stop there. Most significantly, it examined the "fair comparison" requirement of Article 2.4. While it reasoned that the "fair comparison" requirement was not exhausted by the remaining provisions of Article 2.4, it found that any "fairness" obligation had to be well-grounded in the obligations provided in the AD Agreement. The Panel declined to interpret the "fair comparison" requirement in a manner that would place it in conflict with, or nullify, other provisions of the AD Agreement.

17. When the drafters clearly spoke to a particular issue, and limited the extent to which they provided certain obligations, those limits should be respected and not overridden through the vehicle of the "fair comparison" requirement. That is the manner in which the Panel analyzed

the "fair comparison" requirement and reconciled it with Article 2.4.2. Because the obligations of Article 2.4.2 are limited to the investigation phase, the Panel found that it would be improper to impose those obligations beyond the investigation phase. Because provisions of the AD Agreement indicate that average-to-transaction comparisons are sometimes appropriate, the Panel found that such comparisons could not be inherently "unfair" within the meaning of the first sentence of Article 2.4. And, to the extent that requiring offsets for non-dumped transactions would have the effect of nullifying the average-to-transaction comparison methodology provided for in the second sentence of Article 2.4.2, the Panel found that "zeroing" "was not treated as a practice to be banned in all circumstances"[5] and that it could not be deemed as inherently "unfair."

18. Finally, in connection with its examination of assessment proceedings, the Panel examined the nature of such proceedings and considered whether they must be exporter-oriented (and, thereby, take into account the "product as a whole" in the same sense that the Appellate Body used that phrase in connection with its examination of Article 2.4.2 and the requirement to determine a "margin of dumping" for "all comparable export transactions" in *US – Softwood Lumber Dumping (AB)*). Consistent with the limited scope of Article 2.4.2, the Panel found that assessment proceedings need not be exporter-oriented. Instead, the purpose of such proceedings is to determine the antidumping duties to be finally assessed. Because such duties are paid by importers, it is both logical and permissible for such proceedings to focus on specific import transactions and to take account of the differences that may exist in prices paid by various importers.

[5] Panel Report, para. 7.263.

19. Given the history of this issue and the sheer volume of argument presented, there are a number of subsidiary arguments which, while addressed in this submission, need not be addressed in this Executive Summary. These issues were also appropriately addressed in the Panel Report. As discussed below, the EC has provided no reasoned basis upon which the Appellate Body should disturb any of the Panel's findings appealed by the EC.

II. RELEVANT BACKGROUND

20. The Panel was the first panel to be presented with a dispute involving both the methodology for establishing the existence of margins of dumping during the investigation phase and the methodology for calculating the amount antidumping duties assessed on imports covered by an antidumping duty. The United States considers that the Panel's separate findings regarding investigations and assessment proceedings are complementary and reflect a coherent interpretation of Article VI of GATT 1994 and the AD Agreement.

21. In its original form, the antidumping provisions of GATT Article VI provided for a structured approach to remedy injurious dumping: (1) an initial binary inquiry (not dumping / dumping) with an additional threshold (material injury and causation) to discipline the imposition of antidumping duties, and (2) if the initial threshold inquiry resulted in a finding that injurious dumping exists, then a separate measurement of the amount of duty that could be levied on any product found to have been dumped. The AD Agreement, which implements Article VI, also incorporates this structure. Under this phased approach, the investigation serves a gatekeeper function of allowing antidumping duties to be imposed under certain conditions and preventing antidumping duties from being imposed when those conditions are not met. The

function of assessment proceedings, on the other hand, is to measure the amount of antidumping duties that may be levied on products that are subject to an antidumping duty.

22. Among the innovations of the AD Agreement were a number of provisions that elevated the initial threshold for imposition of an antidumping duty. Article 5.1 of the AD Agreement describes this initial inquiry as an "investigation to determine the existence, degree and effect of any alleged dumping." Pursuant to Article 5, the initiation of such an investigation is limited to cases in which adequate evidence of dumping and injury is presented in a written application with the support of the necessary percentage of the domestic industry.[6] With regard to establishing the existence of dumping in an investigation, Article 2.4.2 of the AD Agreement specifies the comparison methodologies that authorities may use. In the case of average-to-average comparisons, Article 2.4.2 requires the use of all comparable export transactions. In the case of average-to-transaction comparisons, the conditions of the second sentence of Article 2.4.2 must be satisfied. With regard to the degree of dumping that must exist to warrant the imposition of an antidumping duty, Article 5.8 of the AD Agreement introduced a *de minimis* threshold of above 2 percent *ad valorem*. With regard to the effect of dumped imports, Article 5.8 added a more precise requirement that the volume of dumped imports be non-negligible.

23. In contrast to the substantive thresholds imposed with respect to the imposition of an antidumping duty, the AD Agreement's innovations regarding the assessment/refund proceedings that take place after an antidumping duty is imposed are largely of a procedural nature. For example, Article 9 requires that parties have access to assessment and refund

[6] Of course, under Article 5.6 of the AD Agreement, in special circumstances authorities may "self-initiate" an investigation, provided that they have sufficient evidence as described in Article 5.2.

proceedings upon request and that such proceedings be conducted in accordance with a reasonable schedule.

24. The U.S. statute governing antidumping proceedings is the Tariff Act of 1930, as amended ("the Tariff Act"). Consistent with the AD Agreement, the Tariff Act provides for distinct phases in proceedings related to any antidumping measure. In the first phase, the Tariff Act – consistent with Article 5 of the AD Agreement – provides for an investigation to examine the threshold question of whether imposition of an antidumping duty is warranted. If an antidumping duty is imposed, then the Tariff Act – consistent with Article 9 of the AD Agreement – provides for a proceeding to determine the amount of antidumping duties to be levied on imports of specific importers of the product covered by the antidumping duty.

25. In the first phase (*i.e.*, before the imposition of an antidumping duty), the Tariff Act requires that U.S. authorities first examines a written application requesting initiation of an antidumping investigation, consistent with Article 5.1 of the AD Agreement. The authorities determine whether the written application is sufficient to justify initiation of an investigation, consistent with Articles 5.2 and 5.3, and determine, consistent with Article 5.4, whether the petition has the support of the requisite proportion of the domestic industry producing the product that is like the product allegedly dumped. These steps are threshold requirements that must be satisfied prior to initiating an investigation. In contrast, the Tariff Act provides – consistent with Article 9 – that an assessment proceeding commences upon request.

26. Once initiated, in an antidumping investigation the U.S. Department of Commerce ("Commerce") examines transactions of the product occurring prior to the initiation. These transactions are examined for the purpose of determining whether or not dumping existed during

the period investigated (*i.e.*, prior to the initiation) for each foreign producer/exporter of the product.[7] Whether or not an antidumping duty is eventually imposed, the transactions investigated in this first phase will not be subject to antidumping duties and will not be examined for the purpose of assessing antidumping duties. In contrast, assessment proceedings only examine transactions upon which antidumping duties may be assessed pursuant to an antidumping duty imposed at the conclusion of an investigation.

27. Prior to imposition of an antidumping duty and consistent with Articles 5.7 and 5.8 of the AD Agreement, the United States determines whether an industry in the United States is materially injured by reason of the dumped imports, whether the volume of such imports from any particular country during the period investigated (*i.e.*, prior to initiation) is negligible, and whether the margin of dumping is *de minimis*. The particular standards of material injury, negligible volume and *de minimis* margins are unique to Article 5 investigations, and are not applicable to the assessment proceedings described in Article 9. Accordingly, consistent with the AD Agreement, the United States does not apply these standards to assessment proceedings to determine antidumping duty liability after the imposition of an antidumping duty.

28. If Commerce and the U.S. International Trade Commission make final affirmative determinations of dumping and injury, respectively, then Commerce imposes an antidumping

[7] *See*, *US – Softwood Lumber Dumping (Panel)* (Dissent), para. 9.22, note 518, *citing* Second Report of the Group of Experts, BISD 9S/194, adopted 27 May 1960 (discussing the "pre-selection system" of conducting antidumping investigations by examining a prior period as the basis for establishing a margin of dumping applicable, at least provisionally, to future imports).

duty, referred to as an "antidumping duty order" in U.S. parlance. The imposition of an antidumping duty completes the investigation phase.[8]

29. Once an antidumping duty is in place, the AD Agreement provides Members with the flexibility to adopt a variety of systems to deal with the assessment of duties. There are two basic types of assessment systems – prospective and retrospective. In a prospective system, normal values or an *ad valorem* duty rate are established and applied prospectively to imports of the merchandise subject to the antidumping duty. The normal values or *ad valorem* rate determine the duties that will be assessed on the product at the time it is imported.

30. The United States has a retrospective assessment system. Once an antidumping duty order is issued, section 751(a) of the Tariff Act provides for a "periodic review of amount of duty," commonly referred to as an "administrative review."[9] The conduct of administrative reviews is governed by section 751 of the Tariff Act, which provides that Commerce shall "review, and determine (in accordance with paragraph (2)), the amount of any antidumping duty."[10] The referenced paragraph (2) requires that Commerce "determine (i) the normal value and export price (or constructed export price) of each entry of the subject merchandise, and (ii) the dumping margin for each such entry."[11] Thus, under U.S. law, the focus of the administrative review is on the calculation and assessment of antidumping duties on imports by individual importers. Under U.S. law, the importer is the person liable for payment of duties applicable to the entry of merchandise, including any antidumping duties imposed.

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[8] The investigation phase also ends without the imposition of an antidumping duty if either of these determinations is negative.

[9] Exhibit EC-33.

[10] *Id.* Section 751(a)(1)(B).

[11] *Id.* Section 751(a)(2)(A).

31. The liability of the importer for the payment of final duties attaches at the time of entry, but duties are not actually assessed at that time. Rather, the United States collects security from the importer in the form of a cash deposit of estimated antidumping duties at the time of importation, and determines the amount of duties due on the import at a later date. The cash deposit amount for each import is determined using an *ad valorem* rate, which estimates the amount of antidumping duties based on the results of the most recently completed proceeding in which the merchandise in question was reviewed. If no administrative review is requested for particular imports, the estimated antidumping duties deposited as security are collected as the final assessment of antidumping duties for those imports.

32. Administrative reviews commence upon the timely request (during the anniversary month of the imposition of an order) of an interested party. As section 751 provides, the purpose of the administrative review is to determine the dumping margin for all imports covered by the review and to assess that amount as antidumping duties to be paid by each importer of merchandise sold at less than normal value.[12] Thus, upon determining the extent to which each export transaction is made at less than normal value, Commerce calculates the amount of antidumping duties to be collected from each importer of dumped merchandise. The actual collection of antidumping duties is accomplished by application of an importer-specific assessment rate, calculated as the amount of antidumping duties to be collected from the importer divided by the entered value of all of the importer's importations of subject

[12] The assessment function of administrative reviews is confirmed by Commerce's regulation, which provides that an administrative review will be rescinded if there are no imports during the period upon which antidumping duties could be assessed. *See* 19 C.F.R. 351.213(d)(3). Exhibit EC-35.2.

merchandise during the period under review. Both the amount of antidumping duties to be collected (the numerator) and the entered value of all imports on which the antidumping duties will be assessed (the denominator) are particular to each importer. Thus, two importers of merchandise from the same exporter may have different antidumping duty assessment rates reflecting the extent to which their own imports were priced below normal value. The table below demonstrates such an assessment calculation for two importers:

Table 1

Exporter A		10.0 % prior estimated cash deposit rate (a)						
	Entered Value (b)	Cash Deposits (c=b*a)	Export Prices (d)	Normal Values (e)	Dumping Margins (e-d)	Assess Rate (e)	Duty Assessed (f=c*e)	Result (f-c)
Importer 1 Model X	$ 19	$ 1.90	$ 19	$ 25	$ 6		$ 4.75	pay $2.85
Model X	$ 20	$ 2.00	$ 20	$ 25	$ 5		$ 5.00	pay $3.00
Model X	$ 21	$ 2.10	$ 21	$ 25	$ 4		$ 5.25	pay $3.15
Importer 1 Total	$ 60 (g)				$15 (h)	25 % (e=h/g)	$15	
Importer 2 Model Y	$ 26	$ 2.60	$ 26	$ 25	$ 0 (-1)		$ 0	$2.60 refund
Model Y	$ 27	$ 2.70	$ 27	$ 25	$ 0 (-2)		$ 0	$2.70 refund
Importer 2 Total	$ 40	$ 4			$ 0 (-3)	0 %	$ 0	
Exporter A Total	$ 100	13.39 % new est. cash deposit (i/d)	$ 112		$ 15 (i)			

33. As the example demonstrates, if the antidumping duties to be assessed for a particular importer exceeds the amount of cash deposits collected, then the difference is collected at the time of final assessment (*e.g.*, Importer 1). If, instead, the cash deposits paid by the importer at the time of entry exceed the final assessment of antidumping duties, the difference is refunded to the importer (*e.g.*, Importer 2). Because assessment rates are calculated on an importer-specific

basis, an importer that purchases merchandise that is not priced at below normal value is able to receive a full refund of cash deposits and incurs no antidumping duty liability.

III. INITIAL OBSERVATIONS

34. Before turning to the EC's main arguments, the United States makes the following initial observations.

35. First, the EC repeatedly alleges that whenever the Panel and/or the United States did not respond to some argument advanced by the EC, this means that the Panel and/or the United States, as the case may be, agrees with the EC.[13] The Appellate Body should reject these arguments where they appear. For one thing, there is no authority – and the EC cites to none – for the proposition that silence with respect to an argument by a party constitutes agreement with that argument. Indeed, insofar as a panel is concerned, such a proposition is inconsistent with the fact that nothing in Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") requires a panel to respond to every argument of a party.[14]

36. In addition, in certain instances, the EC is simply wrong when it asserts that there was no response to an EC argument. For example, with respect to the EC's argument that zeroing constitutes an impermissible allowance or adjustment to price, the United States expressly disagreed with the EC's characterization of zeroing as an adjustment.[15] As for the Panel, it

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[13] *See, e.g.*, Appellant Submission by the European Communities, 24 January 2006, para. 123 (hereinafter "EC Appellant Submission").

[14] *See, e.g., Dominican Republic – Cigarettes (AB)*, para. 125; *EC – Poultry (AB)*, para. 135.

[15] Second Written Submission of the United States of America, April 13, 2005, note 20 (hereinafter "U.S. Second Submission").

clearly rejected the EC's analysis, and treated the EC's characterization of zeroing as an adjustment on an *arguendo* basis.[16]

37. Second, the EC incorrectly accuses the United States of having argued that what the EC calls "the Phrase" has a special meaning within the meaning of Article 31(4) of the *Vienna Convention on the Law of Treaties* ("VCLT"). The United States did not make such an argument, and it is highly revealing to examine closely the places in the record that the EC cites in support of its accusation. For example, in footnote 286 of the EC Appellant Submission, the EC cites to paragraph 43 of the U.S. First Submission as an example of the United States having argued for a special meaning. What the United States actually said is as follows:

> The limited applicability of Article 2.4.2 could not be plainer. Article 2.4.2 by its very terms, is limited to the "investigation phase." Thus, the text leaves no doubt that the Members did not intend to extend these obligations to any phase beyond the investigation phase.[17]

In footnote 286, the EC also cites to paragraph 12 of the U.S. First Answers, in which the United States said as follows:

> The ordinary meaning of the preposition "during" . . . is "throughout the duration of; in the course of, in the time of." The word "during" before the term "the investigation phase" in Article 2.4.2 indicates the drafters' intention to refer to the finite administrative process in which dumping margins are established ... .[18]

Neither example represents an argument by the United States for a "special meaning." Instead, they are arguments that the ordinary meaning demonstrates what the drafters intended. The EC

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[16] Panel Report, para. 7.277 ("*If* zeroing is characterized as an impermissible allowance or adjustment ... ." (Emphasis added)).

[17] First Written Submission of the United States of America, January 31, 2005, para. 43 (hereinafter "U.S. First Submission").

[18] Answers of the United States to the Panel's Questions to the Parties in Connection with the First Substantive Meeting, April 7, 2005, para. 12 (hereinafter "U.S. First Answers").

wrongly asserts that any reference to "drafters intent" automatically amounts to an assertion of "special meaning" under Article 31(4).

38. The United States will not burden the Appellate Body with a recitation of all of the instances where the EC misrepresents U.S. arguments. It is sufficient to note that the United States did not argue that "the Phrase" has a "special meaning" under Article 31(4), but instead argued that the ordinary meaning of the words used in Article 2.4.2 in their context and in light of the AD Agreement's object and purpose limits the obligations in Article 2.4.2 to an investigation under Article 5 of the AD Agreement.

39. Finally, with respect to the Third Participant's Submission of Japan, the United States recalls that under Article 17 of the DSU, third participants are not granted a right of appeal. In this regard, the United States also notes that Japan has attached its submissions to the panel in a separate panel proceeding, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322. These submissions contain factual and legal arguments that were not presented to the Panel in WT/DS294, involve measures that were not within the Panel's terms of reference and that are not the subject of this appeal. Consequently, these submissions are of no relevance to this appeal. Moreover, the United States notes that the focus of Japan's argument is on Article 2.1 of the AD Agreement, a provision with respect to which the EC did not advance a claim.

IV. THE PANEL PROPERLY REJECTED THE EC'S "AS APPLIED" CLAIMS REGARDING ASSESSMENT PROCEEDINGS

40. The primary issue in this appeal is whether, when conducting an assessment proceeding pursuant to Article 9.3 of the AD Agreement, the United States was required to reduce the

amount of dumping duties levied on particular import transactions to account for other import transactions in which merchandise was sold at greater than normal value. In the view of the United States, and as the Panel found, the AD Agreement does not require such an offset when assessing antidumping duties. In particular, because Article 9.3 involves the assessment of antidumping duties, and duties are paid by importers, the United States may determine such duties on an import-specific basis. When an import has been made at less than normal value, the AD Agreement does not require the United States to reduce the antidumping duties assessed on that import based on the amount by which any other imports may have been made at above normal value.

A. The Measures at Issue and the Order of Analysis

41. As was the case before the Panel, the EC is making both "as applied" and "as such" claims in this appeal with respect to the U.S. conduct of assessment proceedings. While the United States disagrees that certain of the alleged measures identified by the EC in its "as such" claims are, in fact, measures, it will not be necessary for the Appellate Body to reach this issue with respect to assessment proceedings because the AD Agreement does not contain obligations with respect to offsets in assessment proceedings. Nevertheless, the United States responds to the EC's claims that certain alleged measures are inconsistent with the AD Agreement "as such" in Section V, below. This present section discusses the lack of any obligation in the AD Agreement with respect to offsets outside of investigations in which the average-to-average comparison methodology is used.

42. The United States addresses the question of whether the AD Agreement prohibits, or even addresses, the denial of offsets for non-dumped imports in assessment proceedings by

starting with Article 2.4.2 of the AD Agreement. This is consistent with the Panel's approach to this analysis[19] and recognizes the fact that, to the extent any offset obligation has been found in the AD Agreement, that obligation has been grounded in Article 2.4.2. The United States then turns to the EC's claim pursuant to Article 2.4, and then to its more general arguments regarding the "product as a whole."

B. Article 2.4.2 of the AD Agreement Applies Only to Investigations

43. In the assessment proceedings at issue, the United States made comparisons between monthly weighted-average normal values and individual export transactions. When the export price was less than the normal value, the difference reflected an amount that the United States was entitled to assess as an antidumping duty for that sale. Because, in the context of duty assessment, there is no obligation to assess "negative duties" or otherwise recognize imports sold at greater than normal value, when the export price was greater than the normal value, the antidumping duty assessed for that sale was zero.

44. The United States aggregated the results of these comparisons on an importer-specific basis to calculate an overall antidumping duty assessment rate for each importer's imports subject to an antidumping duty. This importer-specific assessment rate was calculated by aggregating the results of the comparisons, without reducing the total for any comparisons for which the export price was greater than normal value. This aggregate number was then divided by the aggregate entered value for all imports by that importer in order to develop an aggregate assessment rate (percentage) that could be applied to all of the importer's imports during the relevant period. This process of developing an overall assessment rate for each importer avoided

[19] Panel Report, para. 7.112.

the necessity of reconciling particular imports, as they entered through Customs, with the particular export transactions. However, this process did not change the total amount of duties assessed.

45. Additionally, the United States aggregated the results of all comparisons for the exporter, with no reduction or offset for comparisons for which the export price was greater than normal value. That total was divided by the aggregate sales value for the exporter to establish a new estimated antidumping duty cash deposit rate for future imports.

46. Before the Panel, the EC accepted that the U.S. assessment proceedings were conducted pursuant to Article 9.3.1 of the AD Agreement.[20]

1. Article 2.4.2 Is Expressly Limited to the Establishment of the Existence of Margins of Dumping During the Investigation Phase

47. The starting point in determining whether Article 2.4.2 applies to assessment proceedings under Article 9.3 is the text of Article 9.3.[21] Article 9.3 reads as follows: "The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2." The Panel observed this specific cross-reference to Article 2, and noted that Article 9.3, itself, does not suggest any inapplicability of Article 2.4.2 to assessment proceedings.[22]

48. This, however, does not end the analysis. Rather, it is necessary to consider the text of Article 2 itself to determine if there is any limitation contained therein. As the Panel properly noted:

> If Article 2 itself provides that Article 2.4.2 does not apply in the case of reviews under Article 9.3, that is not overridden by the fact that "Article 2" is specifically

[20] Panel Report, para. 7.143.
[21] Panel Report, para. 7.145.
[22] Panel Report, para. 7.146.

> referred to in Article 9.3. Absent anything explicitly to the contrary, that reference to "Article 2" in Article 9.3 must be read as including any limitation that is expressed in Article 2 itself.[23]

49. The text of Article 2.4.2 provides as follows:

> Subject to the provisions governing fair comparison in paragraph 4, *the existence of margins of dumping during the investigation phase* shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison. (Emphasis added).

50. As demonstrated below, the Panel conducted an exhaustive review of this text, consistent with the customary rules of treaty interpretation. The Panel carefully considered the arguments presented to it by the EC and the United States. After reflecting all of these considerations in its well-reasoned report, the Panel rejected the EC's suggestion that Article 2.4.2 applies beyond the investigation phase and, in particular, that it applies to assessment proceedings.

2. The Panel Properly Interpreted the Ordinary Meaning of the Phrase "the existence of margins of dumping during the investigation phase"

51. Article 2.4.2 contains language that limits the scope of its application to the "investigation phase."[24] The specific term used by Article 2.4.2 is "the investigation phase,"

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[23] Panel Report, para. 7.146.

[24] Panel Report, para. 7.153 and note 245. If Article 2.4.2 were meant to apply to every systematic examination inquiry under the AD Agreement, as the EC posits, see EC Appellant Submission, paras. 186, 187, then there would be no need to include the phrase "during the investigation phase." This phrase must be given meaning. *See, e.g.*, *Japan – Alcohol (AB)*, sections G & H (discussing the principle of effectiveness in treaty interpretation). To do so, the phrase must be regarded as limiting the application of Article 2.4.2. As the Panel noted, this is consistent with the Appellate Body's analysis in *US – Softwood Lumber Dumping (AB)*. Panel

which the Panel found to be key.[25] Article 2.4.2 does not refer to an "investigation" alone. Thus, the analysis of whether there is any limitation on the application of Article 2.4.2 must consider the entire term, "the investigation phase," and not simply the word "investigation."[26]

52. Contrary to the EC's assertion,[27] the Panel analyzed the ordinary meaning of the text of Article 2.4.2. The Panel noted that the ordinary meaning of the word "phase" is "a determinate stage in a process of longer duration ... ."[28] This is consistent with the definition of the word phase as "[a] distinct period or stage in a process or change or development."[29] The specific

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Report, para. 7.154 and note 245.

[25] Panel Report, para. 7.153.

[26] Panel Report, para. 7.153. Indeed, as the EC acknowledges, "investigation phase" is a multi-word noun. EC Appellant Submission, para. 255.

[27] EC Appellant Submission, para. 152.

[28] Panel Report, para. 7.153. Contrary to the EC's assertion, see EC Appellant Submission, para. 251, the use of the word "proceeding" throughout the AD Agreement does not detract from the Panel's analysis. A "proceeding" is defined as "a legal action." *New Shorter Oxford English Dictionary* (1993), p. 2364. In this sense, an antidumping measure itself can be seen as a "proceeding," as it is a legal action taken by a Member to remedy the effects of injurious dumping. Thus, the investigation phase is but one stage in that legal proceeding; the stage at which the Member determines if the imposition of the measure is justified. Other "proceedings," such as assessment proceedings under Article 9.3, are simply legal actions taken to assess the actual antidumping duty. The use of the word "proceeding" does not detract from the fact that the assessment proceeding is but one stage in the overall legal action of imposing an antidumping measure. Moreover, the fact that the word "proceeding" is also used in the AD Agreement does not detract from the fact that Article 2.4.2 uses the term "phase."

[29] *New Shorter Oxford English Dictionary* (1993), p. 2182. The EC faults the Panel for not interpreting the term "phase," as used in Article 2.4.2, synonymously with the word "period." Thus, according to the EC, one should read the phrase "during the investigation phase" to mean "during the period of investigation." EC Appellant Submission, para. 159. The EC's argument, however, fails to recognize that the ordinary meaning of "phase" can refer either to a time period or a specific stage within the context of a larger proceeding. Therefore, even if "phase" were interpreted as a synonym for "period," it would be a period "in a process" and not, as the EC suggests, the period of investigation from which data is analyzed.

Moreover, the phrase "period of investigation" is used four times in the AD Agreement, and consistently refers to a duration of time from which data is collected and analyzed. Panel Report, para. 7.191. Had the drafters meant for the obligations in Article 2.4.2 to apply to a specific duration of time, as opposed to a specific stage within an antidumping proceeding, they

phase to which Article 2.4.2 refers is the "investigation phase," thus indicating "a particular phase, characterized by the word 'investigation' . . . that is distinct from other 'phases'."[30] Moreover, this particular stage is further qualified by the ordinary meaning of the text of Article 2.4.2, in that it is the stage where "the *existence* of margins of dumping" are established.[31] Thus, the Panel's analysis of the ordinary meaning of the text of Article 2.4.2 led it to the correct conclusion that Article 2.4.2 is limited in application to a specific stage in the antidumping process; namely, the stage during which an authority establishes the existence of margins of dumping.[32]

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would have used that same phrase – "period of investigation" – in Article 2.4.2. The fact that the drafters used a different phrase in Article 2.4.2 further supports the conclusion that the phrase "during the investigation phase" should be given a different meaning from "period of investigation."

[30] Panel Report, para. 7.153. The EC contends that the word "investigation," as used in Article 2.4.2 is not an adjective. Rather, together with the word "phase," the term "investigation phase" is a multi-word noun. EC Appellant Submission, para. 255. Regardless of whether "investigation" is used as an adjective, or the term "investigation phase" is a multi-word noun, the fact remains that the use of the word "investigation" in this context modifies the word "phase." Indeed, it is common for two nouns to be placed together so that one noun modifies the meaning of the other noun. Examples include: *opera* tickets, *boat* race, and *auto* show. The EC notes that the drafters did not use the adjectival form of the noun "investigation," which is "investigative." EC Appellant Submission, para. 255. This, however, only further supports the conclusion that the term "the investigation phase" refers to an Article 5 investigation. As demonstrated more fully below, the word "investigation" is used consistently throughout the AD Agreement to refer to that phase where a Member determines whether margins of dumping exist that are injurious to a domestic industry, and thus justify the imposition of an antidumping measure. Had the drafters intended to refer in Article 2.4.2 to some generic activity, as opposed to a discrete stage within a proceeding, they would have used the adjectival form. However, they did not, and the drafters choice of language must be respected.

[31] Emphasis added; *see* Panel Report, para. 7.156.

[32] This conclusion is consistent with the use of the definite article "the" with the term "investigation phase." This further indicates that Article 2.4.2 is limited to a single, distinct investigation phase. While the EC devotes a sub-section of its appellant submission to the word "the," its argument was limited to the assertion that the ordinary meaning of the word "the" cannot justify the Panel's interpretation. EC Appellant Submission, para. 205. This assertion, however, misses the mark, because the Panel's finding was not based solely on the ordinary

a. "The Investigation Phase" Refers to that Stage in Which an Authority Establishes the Existence of Margins of Dumping

53. As the Panel correctly observed, the phrase "the investigation phase," as used in Article 2.4.2, refers to a single stage within a longer proceeding.[33] Relevant to the analysis of this text is the fact that Article 5 of the AD Agreement refers to its subject matter using the word "investigation."[34] Moreover, as the text of Article 2.4.2 demonstrates, "the investigation phase" concerns the establishment of "the *existence* of margins of dumping ... ."[35] This text is similar to that found in Article 5.1, which concerns "an investigation to determine the *existence* of . . . any alleged dumping ... ."[36] While there are other provisions of the AD Agreement that refer to a margin of dumping, as the Panel recognized, "it is only in Article 5 that the 'existence . . . of dumping' must be determined in the context of an 'investigation'."[37]

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meaning of the word "the," but instead relied upon the ordinary meaning of all of the relevant terms, in their context, and in light of the object and purpose of the AD Agreement. Panel Report, paras. 7.150 *et seq*.

While the EC suggests that the Panel erred when it referred to post-antidumping duty actions as "phases" rather than "proceedings," EC Appellant Submission, paras. 250-51 (referencing Panel Report, para. 7.155), the point that the Panel was making was that the EC's interpretation of "during the investigation phase" would have the effect of taking language, the ordinary meaning of which was limiting, and giving it unlimited effect. Panel Report, para. 7.155. Notably, the EC has not responded to the substance of the Panel's concern.

[33] Panel Report, para. 7.153.

[34] Panel Report, para. 7.154.

[35] Emphasis added.

[36] Emphasis added.

[37] Panel Report, para. 7.156. The EC contends that the Panel did not analyze the ordinary meaning of the word "existence." EC Appellant Submission, para. 199. However, the EC misses the point of the Panel's analysis. The Panel noted that in both Article 2.4.2 and Article 5.1 the word "existence" is linked to the word "dumping." Panel Report, para. 7.156. This linkage demonstrates the textual similarity between Article 2.4.2 and Article 5.1, thereby lending support to the Panel's finding that the "investigation phase" to which Article 2.4.2 refers is an Article 5 investigation. Notwithstanding the EC's assertion to the contrary, see EC Appellant Submission, para. 232, textual similarity does serve as context that a treaty interpreter can consider. *See US – Gambling (AB)*, para. 291, in which the Appellate Body agreed with the

54. Indeed, pursuant to Article 1 of the AD Agreement, an antidumping duty can be imposed only "pursuant to an investigation initiated and conducted in accordance with the provisions of [the AD] Agreement." Footnote 1 to Article 1 clarifies that "[t]he term 'initiated' as used hereinafter means the procedural action by which a Member formally commences an investigation as provided in Article 5."[38] Thus, it is clear from the text of the AD Agreement, that an investigation, initiated pursuant to Article 5, is a prerequisite to the imposition of an antidumping duty. The function of such an investigation, according to Article 5.1, is to determine whether dumping exists, its degree, and whether the dumping is affecting a domestic industry adversely. Once this determination has been made, a Member may impose an antidumping duty to offset or prevent dumping equal to the margin of dumping. Considering all of this together, the investigation phase, therefore, is that distinct stage at the beginning of an

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panel that the textual similarity between Article XX of the GATT 1994 and Article XIV of the *General Agreement on Trade in Services* meant that panel and Appellate Body reports interpreting Article XX were relevant to the interpretation of Article XIV.

[38] The EC argues that other actions, taken after the imposition of an antidumping duty, may be "initiated" under the AD Agreement, citing to sunset reviews and other review proceedings. EC Appellant Submission, para. 236. The EC concludes that when a Member "initiates" any action under the AD Agreement, it is initiating an investigation. EC Appellant Submission, paras. 236-38. However, the panel in *US – Corrosion-Resistant Steel Sunset Review* disagreed with this proposition:

> In our view, the use of the word "review" before the word "initiated" in Article 11.3 also suggests that "initiated" as used in Article 11.3 refers to reviews, rather than investigations. As a matter of treaty interpretation based on the text of the treaty, we, as a treaty interpreter, are not permitted to find that the phrase "in a review initiated" in Article 11.3 is equivalent to the initiation of an "investigation" rather than the initiation of a "review".

US – Corrosion-Resistant Steel Sunset Review (Panel), para. 7.42. Thus, fact that the word "initiated" is used elsewhere in the AD Agreement does not mean that all actions initiated under the Agreement are investigations.

antidumping proceeding when the investigating authority determines whether injurious dumping exists such that the imposition of an antidumping duty is warranted.

55. This view of an investigation as involving a determination as to the existence, degree, and effect of dumping before a measure can be imposed is consistent with prior dispute settlement reports. For example, with respect to investigations under the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), the Appellate Body has found that "in an original investigation, the authorities must investigate the existence, degree and effect of any alleged subsidy in order to determine whether a subsidy exists and whether such subsidy is causing injury to the domestic industry so as to warrant the imposition of a countervailing duty."[39] Similarly, in *US – Corrosion-Resistant Steel Sunset Review*, the panel considered it relevant that investigations of dumping involve determining the *existence* of dumping.[40] This consideration of existence, distinct from degree, is indicative of the difference between the investigation phase and the other types of actions that follow the imposition of an antidumping duty. Once injurious dumping has been established, an authority may impose an antidumping duty. The amount of the antidumping duty that is assessed is determined in a later stage; namely, in an assessment proceeding pursuant to Article 9.

56. The Panel cited to these reports, as well as to other Appellate Body reports,[41] to demonstrate that there are distinct phases or stages within both countervailing duty and

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[39] *US – Carbon Steel*, para. 87.

[40] *US – Corrosion-Resistant Steel Sunset Review (Panel)*, para. 7.42.

[41] Panel Report, paras. 7.173-84 (citing *US – Carbon Steel*, paras. 58-97; *EC – Bed Linen (Article 21.5) (AB)*, para. 123; *US – Corrosion-Resistant Steel Sunset Review (AB)*, paras. 107, 124; *US – OCTG from Argentina (AB)*, para. 279; *EC – Bed Linen (AB)*, para. 62, note 30).

antidumping duty proceedings.[42] In both the countervailing duty and antidumping duty contexts, the investigation is the stage that precedes the imposition of a duty.[43] Other stages, such as assessment proceedings and sunset reviews, follow.

57. The limited application of Article 2.4.2 to the investigation phase is consistent with the unique functions of the investigation phase, as compared to other actions under the AD Agreement. The Appellate Body has previously recognized that investigations may serve different purposes than other actions that may occur after a duty has been put in place and, therefore, may be subject to different obligations under the Agreement.[44] The text of the AD Agreement reflects this.

58. For example, in an investigation, if the level of dumping is determined to be *de minimis*, the imposition of an antidumping duty is not justified.[45] However, once an antidumping duty is imposed, even if the level of dumping falls below *de minimis*, this does not automatically obligate a Member to terminate an antidumping duty.[46] Rather, through a review proceeding, pursuant to either Article 11.2 or 11.3, a Member would consider "whether the dumping and injury that once existed are likely to continue or recur in the future."[47]

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[42] Panel Report, para. 7.172.

[43] Panel Report, para. 7.172.

[44] *See, e.g.*, *US – Carbon Steel*, para. 87.

[45] AD Agreement, Article 5.8. *See also US – Carbon Steel*, para. 85 (discussing the *de minimis* standard in the context of a countervailing duty investigation).

[46] *See*, AD Agreement, note 22, which provides as follows: "When the amount of the anti-dumping duty is assessed on a retrospective basis, a finding the most recent assessment proceeding under subparagraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty."

[47] *US – Corrosion-Resistant Steel Sunset Review (Panel)*, para. 7.42.

59. Thus, while a Member may be required to tolerate a degree of dumping below *de minimis*, once a duty is in place, the Member need not continue to tolerate it. Indeed, as Article VI of the GATT states, injurious dumping is to be "condemned." It is in this regard that the Members are permitted, pursuant to Article 9.1 and 9.3, to impose an antidumping duty equal to the full amount of the dumping.

60. Accordingly, the Panel was correct when it concluded that interpreting the phrase "'the investigation phase' to refer 'to an investigation within the meaning of Article 5 makes it possible to maintain a meaningful distinction within the AD Agreement between 'the investigation phase' and subsequent phases ... ."[48] If the phrase were interpreted more broadly, as the EC argues,[49] it would have "the inevitable consequence of eroding any meaningful distinction between 'the investigation phase' and subsequent phases."[50]

61. This analysis is consistent with the principle of effectiveness, which requires that, to the extent possible, all the terms of a treaty be given meaning.[51] The EC faults the Panel for taking this approach, and thus giving the phrase meaning within its context in the AD Agreement.[52] Yet, in considering the ordinary meaning of "the investigation phase" within the context in which it is used in the AD Agreement, the Panel did precisely what it should have done. While

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[48] Panel Report, para. 7.154.

[49] *See* EC Appellant Submission, para. 187.

[50] Panel Report, para. 7.155.

[51] *See, e.g., Japan – Alcohol Taxes (AB)*, sections G & H (discussing the fundamental principle of effectiveness in treaty interpretation); *see also US – 1916 Act (AB)*, para. 123.

[52] EC Appellant Submission, para. 165. The EC argues that the Panel improperly relied on the principle of effectiveness by failing to give meaning to the terms of Article 2.4.2, and instead giving meaning to a contextual argument. EC Appellant Submission, paras. 164-65. In fact, the Panel began with an interpretation of the text of the AD Agreement considering the ordinary meaning of "investigation phase." Panel Report, para. 7.153.

the EC's objection is couched in terms of the customary rules of treaty interpretation,[53] its objection really is nothing more than an unwillingness to accept the fact, as recognized by the Panel, that the word "investigation" in Article 2.4.2 is used to specify the particular "phase" to which the provision applies.[54] The EC's objection is based upon severing the word "investigation" from the word that it modifies – "phase."[55] Because there is no basis in the text or in the customary rules of treaty interpretation for severing these words, the Appellate Body should reject the EC's analysis.

62. Contrary to the EC's arguments, the use of different methodologies in investigations and assessment proceedings does not create an intolerable inconsistency in the concept of dumping. As recognized by the Panel, and as demonstrated above, the initial investigation to determine whether or not to impose an antidumping duty is distinct from, and serves a different purpose than, other proceedings described in the AD Agreement. The imposition of an antidumping duty by a Member triggers obligations of the Member with regard to administering the duty, and imposes numerous regulatory obligations on parties subject to the measure separate and apart from any actual antidumping duties that may be levied.[56] To reiterate, while the function of an investigation is to determine whether injurious dumping exists so as to warrant the imposition of

[53] EC Appellant Submission, para. 167.
[54] Panel Report, paras. 7.153-7.155.
[55] EC Appellant Submission, paras. 186-97.
[56] Indeed, the imposition of an antidumping duty does not require that any antidumping duties actually be assessed if dumping ceases to occur. This is because antidumping duties are not assessed on the transactions initially investigated. Only transactions made subsequent to the imposition of the duty (and those subject to provisional measures) are actually subject to assessment of antidumping duties.

an antidumping duty, the function of assessment proceedings is to determine the amount of antidumping duties that should be assessed

b. Use of the Term "Investigation" in the AD Agreement Supports the Conclusion that "Investigation Phase" Refers to an Investigation Pursuant to Article 5

63. Other references to the word "investigation" throughout the AD Agreement confirm that "the investigation phase," as used in Article 2.4.2, refers to that stage in an antidumping proceeding in which an authority determines whether injurious dumping exists so as to justify the imposition of an antidumping duty. As a result, panels consistently have found that the term "investigation" in Article 5 only refers to the original investigation and not to subsequent actions undertaken after the imposition of an antidumping duty. This is clear from Article 5.7, which provides that evidence of dumping and injury must be considered simultaneously "in the decision whether or not to initiate an investigation" and "during the course of the investigation."[57] Thus, an investigation requires the consideration of both dumping and injury.

64. Likewise, Article 5.8 requires the termination of an "investigation" should the authorities determine that the margin of dumping is *de minimis*. In this context, the existence of a *de minimis* margin of dumping would mean that the imposition of an antidumping duty was not justified. The obligation to terminate the investigation pursuant to Article 5.8 applies only to the investigation phase, and not to some subsequent action, such as a sunset review.[58]

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[57] *EC – Bed Linen (Article 21.5) (Panel)*, para. 6.114 (Article 5.7 applies to investigations).

[58] *US – Corrosion-Resistant Steel Sunset Review (Panel)*, para. 7.70; *see also US – DRAMS AD*, para. 6.87, note 519 ("investigation" means the investigation phase leading up to the final determination of the investigating authority). The EC contends that the panel in *US – DRAMS AD* used the word "investigated" in a manner that suggests that the word "investigation" can encompass other proceedings, such as administrative reviews under the U.S. system. EC

65. The use of the word "investigation" outside of Article 5 further demonstrates that the term refers to the initial investigation necessary before an antidumping duty can be imposed. For example, Article 3.3 concerns whether a Member may cumulatively consider the effect of "imports of a product from more than one country [that] are simultaneously subject to anti-dumping investigations." The Appellate Body has found that this provision, which specifically refers to "investigations," relates to Article 5 investigations and does not address or restrict post-investigation determinations.[59]

66. Article 6 uses the word "investigation" throughout its text to describe its application. It concerns "Evidence," and is placed between Article 5, "Initiation and Subsequent Investigation," and Article 7, "Provisional Measures." Provisional measures apply if there is a preliminary affirmative determination of dumping and injury during an Article 5 investigation.[60] As the Panel found, the placement of Article 6 between the article concerning the initiation of an investigation and the article concerning the imposition of provisional measures as a result of a preliminary determination during an investigation, lends credence to the conclusion that the

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Appellant Submission, para. 194. However, the panel in *US – DRAMS AD* did not use the word "investigation." It used the word "investigated" to describe the action the United States took. Indeed, in reference to the specific proceeding that was the subject of that dispute, the panel used the term "annual review," not "investigation." Thus, *US – DRAMS AD* does not support the EC's contention that the word "investigation," as used in the AD Agreement, encompasses all systemic inquiries.

[59] *US – OCTG from Argentina (AB)*, para. 294. The EC insinuates that because the parties agree that the cumulation provisions of Article 3.3 only apply to Article 5 investigations, this point is irrelevant. EC Appellant Submission, para. 336. The EC makes a similar argument regarding the application of Article 6 to Article 11 proceedings. *Id*. Far from being irrelevant, the text of these provisions confirms the point that the word "investigation," as used in the AD Agreement, refers to an Article 5 investigation. The relevance of these cross-references has been addressed in prior Appellate Body reports. *See, e.g.*, *US – Corrosion Resistant Steel Sunset Review (AB)*, para. 152; *US – OCTG from Argentina (AB)*, para. 239.

[60] *See* AD Agreement, Article 7.1.

"investigation" to which Article 6 applies is an investigation under Article 5.[61] The EC fails to address the Panel's structural analysis of the AD Agreement, and its silence on this point speaks volumes.

67. As further contextual evidence that the "investigations" to which Article 6 applies are Article 5 investigations, Article 11.4 specifically cross-references the obligations concerning evidence and procedure contained in Article 6. If the obligations of Article 6 were meant to apply to all proceedings under the AD Agreement, and not merely to Article 5 investigations, such a cross-reference would not be necessary.[62]

68. Similarly, Article 12.1 concerns the notification and public notice that must be given when an investigation is initiated. If the word "investigation," as used in Article 12.1, were meant to apply broadly to all proceedings under the AD Agreement, then Article 12.3 would not need to clarify that Article 12 applies to reviews under Article 11, and determinations under Article 10 as to whether to apply antidumping duties retroactively.[63] The Panel correctly

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[61] Panel Report, para. 7.161.

[62] Panel Report, para. 7.168. Note also that Article 6.1.3 of the AD Agreement specifically concerns the obligation to provide a copy of the application to initiate an "investigation" to all known exporters, and to make a copy available to all interested parties. This is the application that is required pursuant to Article 5.2 in order to initiate an Article 5 investigation. Thus, the word "investigation" as used in Article 6.1.3 is a "direct link" to an Article 5 investigation. Panel Report, para. 7.161.

[63] Panel Report, para. 7.168. Article 12.3 states, "The provisions of this Article shall apply *mutatis mutandis* to the initiation and completion of reviews pursuant to Article 11 and to decisions under Article 10 to apply duties retroactively." The EC concedes that Article 12.1 applies only to Article 5 investigations. EC Appellant Submission, para. 267. However, the EC contends that this point is "academic" because Article 12.3 confirms that the provisions of Article 12 "are generally applicable." *Id*. The EC ignores the fact that when Article 12 uses the word "investigation," it is not referring to any type of proceeding other than an Article 5 investigation. Indeed, if the word "investigation" had the broad meaning for which the EC argues, then the specific cross-reference in Article 12.3 would be unnecessary.

The EC then faults the Panel for not analyzing the words "*mutatis mutandis*." EC

concluded that: "The need for such cross-references can only be explained by the fact that provisions applicable to 'investigations' (Articles 6 and 12.1-2) are not automatically applicable to provisions dealing with other types of proceedings such as duty assessment proceedings and reviews."[64]

69. The Panel made similar observations with respect to references to the term "investigation" as used in Articles 7, 8, 10 and 12.[65] The Panel concluded:

> Thus, our review of the use of "investigation" and "investigations" in Articles 1, 3, 6, 7, 8, 10 and 12 of the *AD Agreement* reveals that, where these words refer to a proceeding or a phase of a proceeding, they are limited to investigations within the meaning of Article 5.1 of the *AD Agreement*, i.e. investigations that aim to determine whether the conditions for the application of an anti-dumping measures are present. By contrast, the AD *Agreement* typically does not use the words "investigation" and "investigations" in relation to proceedings that take place after an anti-dumping measure has been imposed. In particular, as discussed above, there is nothing in the text of Articles 9 and 11 of the *AD Agreement* to suggest that proceedings under those provisions are "investigations". The *AD Agreement* does not distinguish between "original investigations" and other types of "investigations" but between "investigations" and other types of "proceedings".[66]

70. Article 18.3 further supports the distinction between investigations, which lead to the imposition of a measure, and reviews of existing measures. Article 18.3 is a transition provision that identifies the proceedings to which the AD Agreement applies. Pursuant to its text, the obligations of the AD Agreement apply to "investigations, and reviews of existing measures" that commence on or after the date of entry into force of the WTO Agreement for the Member

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Appellant Submission, para. 267. However, the presence of these words merely confirms the Panel's conclusion. The words mean that the provisions apply, changing what needs to be changed.

[64] Panel Report, para. 7.168 (footnote omitted); *see also US – Corrosion Resistant Steel Sunset Review (AB)*, para. 152; *US – OCTG from Argentina (AB)*, para. 239.

[65] Panel Report, paras. 7.162-65.

[66] Panel Report, para. 7.166 (footnote omitted).

conducting the proceeding. As the Panel found, "the juxtaposition of these two concepts in the same sentence makes it unambiguously clear that the drafters of the *AD Agreement* were aware of the difference between these two concepts."[67] Thus, the word "investigations," as used in Article 18.3 refers to one type of proceeding under the AD Agreement, while the word "reviews" refers to a different type of proceeding. This demonstrates a recognition that not all proceedings commenced under the AD Agreement are to be considered "investigations."[68]

71. Finally, in this regard, the EC cites to various examples of the use of the word "investigation" in U.S. municipal antidumping law in an attempt to demonstrate that the United States does not consistently use the word "investigation" to refer to an Article 5 investigation. However, the label that the United States uses under its municipal law for various proceedings falling under the AD Agreement is irrelevant to this dispute. There are no obligations under the AD Agreement to apply any specific labels under municipal law to the proceedings that the AD

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[67] Panel Report, paras. 7.162-65.

[68] The EC notes that Article 18.3 refers only to "investigations" and "reviews," while Article 18.3.1 explicitly refers to "refund procedures under paragraph 3 of Article 9." EC Appellant Submission, paras. 246-247. According to the EC, because Article 18.3 is "subject to" Article 18.3.1, refund proceedings can be either "investigations" or "reviews." EC Appellant Submission, para. 247. The EC then asserts that because Article 9.5 indicates that refund proceedings are not "reviews," they must be "investigations." EC Appellant Submission, para. 247.

The EC is incorrect. Nothing in Article 9.5 explicitly states that refund proceedings are not "reviews." Rather, Article 9.5 merely states that if an exporter or producer did not ship the subject merchandise during the period of investigation, the investigating authorities must promptly conduct a review to determine a margin of dumping for that exporter or producer. The reference to the "normal duty assessment and review proceedings in the importing Member" is simply a reference to the municipal laws of the Members, and is not a definition of an assessment proceeding as something other than a "review." Moreover, Article 18.3.1 uses the term "refund procedures under paragraph 3 of Article 9." It does not specifically refer to assessment procedures as "investigations." The EC argument regarding Article 18.3, therefore, is to no avail.

Agreement governs. Moreover, the specific term at issue is not simply "investigation," but "investigation phase." Thus, the use of "investigation" labels in U.S. domestic law has no bearing on what the term "investigation phase" means under the AD Agreement.

c. Article 9.3 Assessment Proceedings Are Not Investigations

72. As demonstrated above, the obligations of Article 2.4.2 are limited to the establishment of the existence of margins of dumping during the investigation phase. The term "the investigation phase," properly interpreted, refers to that stage at the beginning of the antidumping proceeding during which time the Member determines whether injurious dumping exists so as to justify the imposition of an antidumping duty.

73. Article 9 assessment proceedings, by contrast, are not investigations, and are not concerned with the existential question of whether injurious dumping "exists." Instead, Article 9 assessment proceedings are concerned with the measurement of dumping in order to establish the amount of an antidumping duty that an importer must pay. Pursuant to Article 9.3, a Member may impose an antidumping duty equal to the margin of dumping. Articles 9.3.1 and 9.3.2 concern the obligation to refund any amounts paid in excess of the amount that a Member determines is the final liability for antidumping duties.

74. If, during an assessment proceeding, the margin of dumping is determined to be zero, this means that the Member may not assess, or must refund, any amount of antidumping duties for the import transactions subject to that proceeding. Such a determination during an assessment proceeding does not require a Member to terminate the antidumping duty.[69]

[69] This is confirmed by footnote 22 to the AD Agreement, which provides that a finding of no duty liability in an Article 9.3.1 assessment proceeding "shall not by itself require the authorities to terminate the definitive duty." In other words, unlike an Article 5 investigation, an

75. Thus, pursuant to the AD Agreement, the function of an Article 5 investigation is different from the function of an Article 9 assessment proceeding. Obligations that apply with respect to an Article 5 investigation do not necessarily apply to an Article 9 assessment proceeding. Given the specific reference to "the investigation phase" in Article 2.4.2, the Panel properly concluded that the requirements of that article do not apply to assessment proceedings.

d. The Panel Properly Considered the Ordinary Meaning of Article 2.4.2 in Its Context and in Light of the Object and Purpose of the AD Agreement

76. The EC argues that the Panel failed to consider the ordinary meaning of the text of Article 2.4.2, and instead considered only the text's context within the AD Agreement.[70] However, as demonstrated above, the Panel clearly considered the words used in Article 2.4.2. Moreover, the EC admits that none of the elements involved in interpreting a treaty (*i.e.*, the ordinary meaning, context and object and purpose) are to be considered in isolation.[71] As the EC itself states, "each factor can affect the interpretation; and all factors need eventually to be synthesised."[72] Contrary to the EC's insinuations, the Panel did consider the synthesis of the ordinary meaning of the text of Article 2.4.2, in its context, and in light of the object and purpose of the AD Agreement.

3. The Panel Gave Proper Consideration to Prior Panel and Appellate Body Reports

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Article 9.3.1 assessment proceeding does not involve the existential question of whether there is injurious dumping sufficient to warrant the imposition of a duty. As mentioned, other than Article 5 and paragraph 2.4.2, no other provision in the AD Agreement makes reference to this "existence" inquiry.

[70] EC Appellant Submission, para. 152.

[71] EC Appellant Submission, para. 153.

[72] EC Appellant Submission, para. 153.

77. The EC suggests that the Panel failed to give appropriate consideration to certain panel and Appellate Body reports.[73] To the contrary, the Panel carefully considered those reports to the extent they were relevant.

78. The Panel interpreted Article 2.4.2 in accordance with customary principles of treaty interpretation and concluded that Article 2.4.2 applies only to Article 5 investigations. The Panel then properly looked to prior panel and Appellate Body reports and found that these reports confirmed the correctness of the Panel's conclusion. Specifically, the Panel found that these reports recognized that there are differences between the investigation phase and the actions that occur following the imposition of a duty pursuant to either the AD Agreement or the SCM Agreement.[74] Thus, in *US – Carbon Steel*, the Appellate Body found that the *de minimis* standard of Article 11.9 of the SCM Agreement applied to investigations, and not to sunset reviews under Article 21.3.[75] *EC – Bed Linen (Article 21.5),*[76] *US – Carbon Steel*,[77] and *US – Corrosion-Resistant Steel Sunset Review*,[78] all support the Panel's finding that prior panel and Appellate Body reports have recognized the existence of distinctions, both in legal obligations and in purpose, between investigations and other actions in an antidumping or countervailing

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[73] EC Appellant Submission, paras. 333-39.

[74] Panel Report, para. 7.171.

[75] Panel Report, para. 7.173 (citing *US – Carbon Steel*, para. 68). The EC argues that *US – Carbon Steel* is inapplicable because the SCM Agreement does not use the word "phase," and because there is no provision in the SCM Agreement analogous to Article 2.4.2 of the AD Agreement. EC Appellant Submission, para. 334. However, the Panel did not rely on *US – Carbon Steel* because the word "phase" was at issue in that dispute, but instead because the report recognized that there are distinct stages within an overall proceeding, and that different obligations apply to those stages. *See* Panel Report, paras. 7.171-176.

[76] Panel Report, para. 7.174 (citing *EC –Bed Linen (21.5)*, para. 123).

[77] Panel Report, para. 7.176 (citing *US – Carbon Steel*, para. 87).

[78] Panel Report, para. 7.177 (citing *US – Corrosion-Resistant Steel Sunset Review*, para. 107).

duty proceeding.[79] More specifically, they support the Panel's conclusion that an Article 5 investigation is a distinct phase within an antidumping proceeding, the purpose of which is to determine the existence of margins of dumping. Once the existence of injurious dumping has been determined, the prerequisite of Article 1 has been met, and a Member may impose an antidumping duty. Once the duty has been imposed, the exact amount of the duty to be finally assessed may be subsequently determined in an Article 9 assessment proceeding.[80]

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[79] The EC contends, at paragraph 336 of its Appellant Submission, that *US – Carbon Steel (AB)* and *US – Corrosion-Resistant Steel Sunset Review (AB)* do not support the following statement of the Panel:

> As affirmed by the Appellate Body in *US – Carbon Steel* and *US – Corrosion-Resistant Steel Sunset Review*, rules relating to due process aspects of investigations contained in Article 12 of the *SCM Agreement* and Article 6 of the *AD Agreement* apply to reviews under Article 21 of the *SCM Agreement* and Article 11 of the *AD Agreement* only because they are expressly referred to in those provisions.

Panel Report, para. 7.182. The EC is wrong. In *US – Carbon Steel (AB)*, para. 72, the Appellate Body stated: "[W]e read the express reference in Article 21.4 to Article 12, but not to Article 11, as an indication that the drafters intended that the obligations in Article 12, but not those in Article 11, would apply to reviews carried out under Article 21.3." Similarly in *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 152, the Appellate Body stated: "These provisions of Article 6 apply to Article 11.3 by virtue of Article 11.4."

[80] The EC contends that the fact that there are different proceedings under the AD Agreement "does not excuse the US from respecting the obligations in Article 2.4.2." EC Appellant Submission, para. 335. This statement, however, assumes the very point that the EC is seeking to prove; namely, that Article 2.4.2 applies to Article 9.3 assessment proceedings. As demonstrated above, Article 2.4.2 is limited to the establishment of the existence of margins of dumping during the investigation phase; *i.e.*, the phase during which the authorities determine whether the imposition of an antidumping duty is justified. That there are different stages within an antidumping proceeding, with different purposes and different obligations, merely supports the conclusion that Article 2.4.2, while applicable during the investigation phase, is not applicable during the assessment phase.

79. The Panel noted that its finding that Article 2.4.2 is limited to investigations was consistent with the panel's finding in *Argentina – Poultry*. Specifically, the Panel found the following passage from *Argentina – Poultry* to be relevant:

> We consider that Brazil's principal argument misinterprets the reference to "margin of dumping" in Article 9.3. Based on that language, Brazil focuses entirely on Article 2.4.2, and the reference to the "investigation phase" in that provision. However, Article 9.3 does not refer to the margin of dumping established "under Article 2.4.2", but to the margin of dumping as established "under Article 2". In our view, this means simply that, when ensuring that the amount of the duty does not exceed the margin of dumping, a Member should have reference to the methodology set out in Article 2. This is entirely consistent with the introductory clause of Article 2, which sets forth a definition of dumping "for the purpose of this Agreement . . . ." In fact, it would not be possible to establish a margin of dumping without reference to the various elements of Article 2. For example, it would not be possible to establish a margin of dumping without determining normal value, as provided in Article 2.2, or without making relevant adjustments to ensure a fair comparison, as provided in Article 2.4.[81]

80. Article 9.3 concerns the assessment of antidumping duties. Importers, generally, are the parties that pay the antidumping duties, based on specific import transaction. Thus, as the Panel properly recognized, the "margin of dumping," as used in Article 9.3, relates to the liability incurred with respect to a specific import transaction.[82] The availability of the prospective normal value assessment system, pursuant to Article 9.4, demonstrates that Members may assess antidumping duties on an importer-specific, or even an import-specific, basis.[83] The amount of that antidumping duty is limited to the margin of dumping, "as established under Article 2." Therefore, consistent with *Argentina – Poultry*, a Member may determine the margin of dumping during an assessment proceeding on an import- or importer-specific basis, following the

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[81] *Argentina – Poultry (Panel)*, para. 7.357.
[82] Panel Report, para. 7.201.
[83] Panel Report, para. 7.206.

applicable methodologies established in Article 2. In light of this context, the use of the term "margin of dumping" in Article 9.3 indicates that the antidumping duty for a specific import transaction cannot be greater than the amount by which the export price for that transaction falls below normal value as determined in a calculation consistent with Article 2.[84]

81. Thus, the Panel properly took into account prior panel and Appellate Body reports. The EC's criticisms of the Panel ignore the basic premise for which the Panel cited these reports. The Panel did not treat any of the reports as determinative of the issue before it. Instead, the Panel simply recognized a consistent pattern throughout those reports that was consistent with its own findings.[85]

4. The Panel Correctly Rejected the EC's Multiple Alternative Interpretations of "During the Investigation Phase"

82. As it has in this appeal, the EC proffered various alternative interpretations of "during the investigation phase" to the Panel. Noting that the EC itself did not endorse any of the interpretations, the Panel found none of them to be persuasive.[86]

83. The EC's first alternative interpretation is that the phrase "during the investigation phase" means "period of investigation." The EC, however, offers no reasoning as to why, after using the phrase "period of investigation" four times in Article 2, the drafters abandoned this

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[84] While the EC contends that the Panel erred in its analysis of *Argentina – Poultry*, it is unclear what the alleged error is. *See* EC Appellant Submission, para. 337. The EC argues that *Argentina – Poultry* rejected Brazil's argument that the margin of dumping to which Article 9.3 refers is the margin of dumping determined during an Article 5 investigation. *Id*. The EC goes on to quote from *Argentina – Poultry* where the panel clearly recognizes that Article 2.4.2 is unique in that it applies only to the establishment of the margins of dumping during the investigation phase. *Id*. (citing *Argentina – Poultry*, para. 7.357). There is, however, nothing inconsistent between these statements and the Panel's discussion of *Argentina – Poultry*.

[85] Panel Report, para. 7.186.

[86] Panel Report, para. 7.197.

term in Article 2.4.2 if they wished to impart the same meaning. The EC's argument simply amounts to an assertion that there is no rule against synonyms.[87] Of course, where the alleged synonym involves words that may more naturally impart a distinct meaning, erroneously suggesting that the phrase is simply a synonym would deprive the phrase of its unique meaning without textual support and would not be consistent with the customary rules of treaty interpretation.

84. The EC's second alternative interpretation was that the phrase "during the investigation phase" placed a limit on the amount of time in which the investigating authorities must make their determination.[88] The Panel addressed this issue, and properly concluded that "Article 2 [...] does not address procedural aspects, such as the timing of determinations."[89] Instead, other articles within the AD Agreement address specific time limits and to read "during the investigation phase" as imposing a time limit – and, at that, a time limit specified elsewhere in the AD Agreement – would render those other articles redundant.[90]

85. Likewise, the EC's multiple "sub-interpretations" referring to a "fresh data rule,"[91] or establishing a substantive violation to accompany any procedural violation of any time limits,[92] or distinguishing a "post-investigation period"[93] are without any textual support and cannot be reconciled with the context of Article 2.4.2, which provides for the comparison methodologies to be used to establish the existence of margins of dumping.

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[87] EC Appellant Submission, para. 318.
[88] EC Appellant Submission, para. 321.
[89] Panel Report, para. 7.195.
[90] Panel Report, para. 7.195, referring to AD Agreement, Articles 5.10, 9.3 and 11.
[91] EC Appellant Submission, para. 323.
[92] EC Appellant Submission, para. 324-25.
[93] EC Appellant Submission, para. 326.

86. The EC's final alternative interpretation of the phrase "during the investigation phase" is that it indicates that the obligations in Article 2.4.2 do not apply to any pre-investigation activities.[94] As is the case with its other alternative interpretations, the EC offers no textual support for this alternative, nor does it reconcile its suggestion with the context of Article 2.4.2. As the Panel noted, other provisions of the AD Agreement, particularly Article 5.2, provide requirements for an application for an antidumping investigation and it would be illogical for the drafters to have provided for this sort of negative requirement in such an obscure fashion in Article 2.4.2.[95]

87. Indeed, all of the alternative interpretations offered by the EC suggest that, if anything, an application of the customary rules of treaty interpretation may not yield one and only one interpretation of "during the investigation phase" as it is used in Article 2.4.2. To that end, for the reasons advanced by the United States and adopted by the Panel in its report, interpreting that phrase as limiting the obligations of Article 2.4.2 to investigations within the meaning of Article 5 must be considered a permissible interpretation pursuant to Article 17.6(ii) of the AD Agreement.

[94] EC Appellant Submission, para. 328.
[95] Panel Report, para. 7.196.

5. The Panel Correctly Rejected the EC's Arguments Regarding the Object and Purpose of Article 9.3 and the AD Agreement

88. Before the Panel, the EC argued that the limitation of Article 2.4.2 to Article 5 investigations was inconsistent with the object and purpose of Article 9.3.[96] Specifically, the EC argued that "the purpose of a duty assessment proceeding under Article 9.3.1 is simply to update the temporal frame for the normal value . . . ."[97] Thus, according to the EC, there is no reason to apply a different comparison methodology in an assessment proceeding than in an Article 5 investigation.[98] The Panel correctly rejected this argument.

89. As an initial matter, only a *treaty* can have an "object and purpose" as understood under the customary rules of treaty interpretation. Article 31(1) of the VCLT provides that, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The word "its" before "object and purpose" refers to the singular "treaty," rather than to the plural "terms of the treaty."[99]

90. This is not to say that an individual treaty provision cannot have a particular purpose or function. However, the purpose or function of any provision can be determined only by ascertaining what the provision means, which requires, pursuant to Article 3.2 of the DSU, recourse to the customary rules of interpretation of public international law, which call for consideration of the *treaty's* object and purpose.

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[96] Panel Report, para. 7.198.
[97] Panel Report, para. 7.199.
[98] Panel Report, para. 7.199.
[99] *US – Corrosion-Resistant Steel AD Sunset Review (Panel)*, para. 7.44 (referring to the "object and purpose of the *treaty*" (emphasis added)); and *EC – Hormones*, para. 104 (discussing "the *treaty's* object and purpose" (emphasis added)).

91. Turning to the substance of the EC's argument, as noted above, the text of the AD Agreement confirms that the function of an Article 5 investigation is to determine whether injurious dumping exists so as to justify the imposition of an antidumping duty. By contrast, Article 9.3 concerns the determination of antidumping duty liability with respect to individual import transactions once an antidumping duty has been imposed. During an Article 9 assessment proceeding, the pricing behavior of an exporter or producer must be translated into a duty to be paid by the importers. Thus, considerations relevant to determining whether an exporter's or producer's pricing behavior justifies the imposition of an antidumping duty may not have the same relevance in measuring the amount of antidumping liability for a particular importer.[100]

92. For example, if one importer buys merchandise subject to an antidumping duty at dumped prices, while another buys the same merchandise from the same exporter at prices above normal value, there is no reason why the first importer's antidumping liability should be reduced because the second importer incurs no antidumping duty liability. The U.S. approach of importer-specific assessments ensures that those importers that purchase merchandise at dumped prices are liable for antidumping duties, while those importers that purchase merchandise at non-dumped prices are not liable.

93. As recognized by the Panel, the EC's approach would prohibit the assessment of antidumping duties on an importer- or import-specific basis.[101] Instead, antidumping duty liability would be based on the overall pricing behavior of the exporter or producer. However, nothing in the text of the AD Agreement requires that a Member's duty assessment system be

[100] Panel Report, para. 7.201.
[101] Panel Report, para. 7.203.

exporter-oriented.[102] To the contrary, "Articles 9.3 and 9.4 provide little detail as regards the substantive methodology to be followed by an authority to determine the basis for attributing liability in respect of a particular transactions."[103] If anything, the availability of the prospective normal value system confirms that a Member may establish an assessment system that is oriented toward a particular importer, or even particular import transactions.[104] The Panel stated succinctly:

> In our view, if the drafters of the *AD Agreement* had wanted to impose a uniform requirement to adopt an exporter oriented-method of duty assessment, which would have entailed a significant change to the practice and legislation of some participants in the negotiations, they might have been expected to have indicated this more clearly.[105]

94. The EC takes issue with the Panel's conclusion that there is no legal relevance to the fact that a retrospective and prospective assessment system may result in the collection of a different amount of antidumping duties.[106] Specifically, in a prospective normal value system, when the amount of the duty paid is less than the actual margin of dumping, a Member is unable to collect the difference. However, in a retrospective assessment system, if an importer pays a cash deposit that is less than the margin of dumping as determined in an assessment proceeding, a Member may collect the difference from the importer.

95. The EC fails to consider, however, that there are many different advantages and disadvantages to both the prospective and retrospective assessment systems. Thus, for example,

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[102] Panel Report, para. 7.204.
[103] Panel Report, para. 7.204.
[104] Panel Report, para. 7.205.
[105] Panel Report, para. 7.204. In Section IV.E.2, below, the United States discusses in further detail the permissibility under the AD Agreement of an import-oriented assessment system.
[106] EC Appellant Submission, para. 294.

while a retrospective system may result in a more accurate calculation of the actual margin of dumping for all export transactions, a prospective assessment system may be more predictable for importers and easier for authorities to administer.[107] Given the pros and cons of the different systems, the AD Agreement should not be interpreted so as to require "the same level of protection against dumped imports."[108]

6. The Panel Correctly Rejected the EC's Arguments Regarding Subsequent Practice

96. The EC purports to have submitted evidence demonstrating that the Members did not intend to limit the application of Article 2.4.2 to Article 5 investigations, referring to the notifications of 105 Members concerning their municipal laws implementing the AD Agreement.[109] This evidence, however, fails to demonstrate a uniform intention that the obligations contained in Article 2.4.2 apply beyond Article 5 investigations.

97. In many instances, the notifications to which the EC refers concern legislation that predated the AD Agreement.[110] Many of the notifications make no mention of duty assessment, and thus do not give an indication as to the methodology used in any assessment proceeding.[111] Moreover, the notifications demonstrate that many Member utilize a variable duty assessment system, which, as the Panel recognized, "would appear to suggest that those Members do not apply the symmetrical comparison methods foreseen in Article 2.4.2 to determine the amount of liability for payment of anti-dumping duties."[112] The Panel concluded that, at most, the evidence

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[107] Panel Report, para. 7.211.
[108] Panel Report, para. 7.211.
[109] EC Appellant Submission, para. 303.
[110] Panel Report, para. 7.217.
[111] Panel Report, para. 7.217.
[112] Panel Report, para. 7.217.

adduced by the EC demonstrates only "that a considerable number of WTO Members have adopted an approach different from that of the United States."[113] As such, this evidence fails to demonstrate the intention of the drafters regarding the limiting language – "during the investigation phase" – contained in Article 2.4.2.

98. A more objective consideration of the subsequent practice of Members may be derived from the work of the WTO's Committee on Antidumping Practices. The Committee was established by Article 16 of the AD Agreement in order to allow "Members the opportunity of consulting on any matters relating to the operation of the Agreement or the furtherance of its objectives." The Committee is composed of representatives from each Member that include many capital-based antidumping administrators. Furthermore, a consensus of these experts must be reached before a recommendation is issued by the Committee. Therefore, though its recommendations are not binding, they are authoritative and have been referenced in panel and Appellate Body reports.[114]

99. In its recommendations, the Committee has consistently interpreted the term "investigation" as referring to Article 5 investigations. In its recommendation regarding the "period of investigation," the Committee explained that the term, which is used multiple times in Article 2, refers to "original investigations to determine the existence of dumping and consequent injury ... ."[115] Then, when discussing investigations pursuant to Article 5.8 of the AD

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[113] Panel Report, para. 7.218.

[114] The Appellate Body recently cited the Committee's explanation regarding the meaning of the term "period of investigation." *EC – Cast Iron Fittings (AB)*, para. 80, note 73 (citing *Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations*, Committee on Anti-Dumping Practices, G/ADP/6, adopted 5 May 2000).

[115] *Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations*, Committee on Anti-Dumping Practices, G/ADP/6, adopted 5 May 2000

Agreement, it again referred to them as "original investigations to determine the existence of dumping and consequent injury ... ."[116] Thus, outside the context of a particular dispute, in a forum composed of the Member's antidumping officials, the commonly accepted understanding is that the word "investigation" used in Article 2 refers to Article 5 investigations.

100. Further objective evidence regarding the subsequent practice of Members in interpreting the term "investigation" may be derived from an examination of the semi-annual reports of preliminary and final anti-dumping actions filed with the Committee pursuant to Article 16.4 of the AD Agreement. Most such reports contain codes to indicate whether an action was taken as a result of an investigation or a review. For example, in its most recently filed semi-annual report of actions taken during the first half of 2005, Brazil used the code "R" to indicate that an action was taken pursuant to a review, and, in footnote 1, specifically identified other actions as "investigations."[117] Although assessment proceedings are uncommon in the practices of many Members, other Members who conducted assessment proceedings during the same reporting period used similar codes.[118] Significantly, the EC's own most recently filed report, in the footnotes to Annex I, specifically distinguishes "new investigations" from "expiry reviews," "interim reviews," and "newcomer reviews."[119] Further, in Annex V of the same report, the EC again distinguishes "new investigations" from "interim reviews" and "expiry reviews." Only

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(emphasis added).

[116] *Recommendation Concerning the Time-Period to be Considered in Making a Determination of Negligible Import Volumes for Purposes of Article 5.8 of the Agreement*, Committee on Anti-Dumping Practices, G/ADP/10, adopted 29 November 2002) (emphasis added).

[117] G/ADP/N/132/BRA (26 August 2005).

[118] See, e.g. G/ADP/N/132/AUS (28 July 2005) (Australia); G/ADP/N/132/CAN (12 August 2005) (Canada); and G/ADP/N/132/IND (21 October 2005) (India).

[119] See, G/ADP/N/132/EEC (21 September 2005).

anti-circumvention and anti-absorption proceedings are referred to as "investigations." Proceedings under Article 9.5 of the AD Agreement are referred to inconsistently in this annex as "new exporter reviews" (polyethylene terephthalate (PET) from India) and "newcomer investigations" (urea and ammonium nitrate solutions from Algeria). The United States notes, however, that in a submission recently filed with the WTO Rules Negotiating Group, the EC refers to the corresponding proceedings under the SCM Agreement as "newcomer reviews."[120]

7. The Panel Considered the EC's Arguments Regarding Supplementary Means of Treaty Interpretation

101. The EC contends that the preparatory work to the AD Agreement demonstrates that the drafters intended to proscribe average-to-transaction comparisons in all instances except where the second sentence of Article 2.4.2 applies.[121] The Panel, however, addressed this argument, and found it lacking in merit.

102. Specifically, the Panel noted that while the EC relied on the negotiating history to assert that there had never been a distinction made between investigations and reviews, the documents on which the EC relied predated the release of the first draft that introduced the phrase "when establishing the existence of dumping margins during the investigation phase."[122] Moreover, the Panel noted: "It is also clear from the fact that the second sentence of Article 2.4.2 of the 'New Zealand I' text used 'period of investigation,' that 'investigation phase' in the first sentence must have been understood to have a different meaning."[123] Thus, the Panel correctly found that none

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[120] Countervailing Measures, Paper from the European Communities, TN/RL/GEN/93 (18 November 2005).

[121] EC Appellant Submission, para. 316.

[122] Panel Report, para. 7.219.

[123] Panel Report, para. 7.219.

of the documentation provided by the EC demonstrates an understanding that the word "investigation" was intended to encompass all proceedings under the AD Agreement.

8. The Appellate Body Should Reject the EC's Additional Arguments Regarding Article 2.4.2

a. The Second Sentence of Article 2.4.2 Does Not Apply Beyond the Investigation Phase

103. In this appeal, the EC argues, in the alternative, that because the phrase "during the investigation phase" does not appear in the second sentence of Article 2.4.2, the obligations of the second sentence are not limited to the investigation phase.[124] In other words, the EC argues that the limitation on the use of average-to-transaction comparisons applies after the investigation phase, when an antidumping duty is in place.

104. This argument, however, cannot be reconciled with the text of Article 2.4.2 in its entirety. The first sentence of Article 2.4.2 establishes the normal rule that applies during the investigation phase. The second sentence creates an exception to that normal rule. If the normal rule established in the first sentence is applicable only during the investigation phase, then logically the exception to that rule and the conditions precedent to applying the exception contained in the second sentence are also applicable only during the investigation phase.

b. Article 11.2 Is Not Applicable to Article 9.3 Assessment Proceedings

105. The EC argues that because the United States uses the results of its assessment proceedings to revise the estimated cash deposit rate – characterized by the EC as a "varying" duty rate – the provisions of Article 11.2 apply.[125] Assuming *arguendo* that an estimated cash

[124] EC Appellant Submission, para. 170.
[125] EC Appellant Submission, para. 242.

deposit rate is a "varying" duty, as claimed by the EC, the determination of such a rate in an assessment proceeding conducted pursuant to Article 9.3 of the AD Agreement does not constitute a review of the continued necessity of the antidumping duty and, thus, is not subject to the obligations of Article 11.2. The EC's argument is based on a misreading of the plain language of Article 11.2 of the AD Agreement.

106. Contrary to the EC's assertion, Article 11.2 does not expressly refer to a proceeding where the duty is varied, but rather to a determination of the consequences *if* the duty is varied. Specifically, Article 11.2 allows interested parties to request a review to determine "whether the injury would be likely to continue or recur if the duty were removed or varied." Therefore, an Article 11.2 review is focused on the continuation or recurrence of injury if the duty were varied, rather than on a determination of a varying duty rate. The EC claims that footnotes 21 and 22 to the AD Agreement confirm its position. However, its reliance on these footnotes is misplaced. In fact, the footnotes support the position that assessment proceedings conducted under Article 9.3 of the AD Agreement are not subject to the obligations of Article 11.2. Footnote 21 simply states that a determination of liability for payment of antidumping duties made pursuant to Article 9.3 does not, by itself, constitute a review under Article 11.2. As for footnote 22, it states that in a retrospective system, a finding in a proceeding conducted pursuant to Article 9.3 that no duty is to be levied does not by itself require termination of the duty. Neither of these provisions supports the view that a determination of the amount of antidumping duty to be assessed on specific import transactions, or a determination to vary the cash deposit rate, relates to the inquiry called for by Article 11.2 as to whether injury would likely continue or recur if the duty were removed or varied.

c. The Use of the Word "Normally" Is Consistent with the Panel's Interpretation of Article 2.4.2

107. The EC argues that the use of the word "normally" in Article 2.4.2 undermines the Panel's interpretation of Article 2.4.2.[126] The EC contends that if the obligations of Article 2.4.2 were constrained to Article 5 investigations, this would mean that the obligations of Article 2.4.2 apply only to one situation, and, thus, would not be a "normal" rule.[127]

108. The word "normally" in Article 2.4.2, however, lends no support to the EC's argument. Rather, Article 2.4.2 provides that the "normal" rule in an investigation is that the comparisons used to establish the existence of margins of dumping involve either average-to-average comparisons or transaction-to-transaction comparisons. The second sentence of Article 2.4.2 provides an exception to the normal rule for investigations provided in the first sentence of Article 2.4.2. Contrary to the EC's suggestion, the fact that the "normal" rule for investigations might not be the "normal" rule for assessment proceedings, sunset reviews, changed circumstance reviews, or new shipper reviews does not detract from it being the "normal" rule for investigations.

d. The EC's Purported "Rules of Grammar" Do Not Invalidate the Panel's Interpretation

109. The EC asserts that the Panel's interpretation of "during the investigation phase" is inconsistent with rules of English grammar. The EC's assertion, however, is without foundation or support. Like the Dissent, the EC asserts, without substantiation, that application of a rule of

[126] EC Appellant Submission, para. 220.
[127] EC Appellant Submission, para. 220.

grammar commands that the phrase "during the investigation phase" modify the word "existence" and not the word "establish."[128]

110. In support of its assertion, the EC provides a catalog of grammatical units, word classes, phrases, and sentence elements, accompanied by citations to extracts of an English grammar text.[129] Upon close examination, however, the EC provides no actual rule of grammar that supports its position. Instead, the EC simply asserts that the phrase "during the investigation phase" must modify the word "existence."[130] According to the EC, "any other conclusion" – such as the one reached by the Appellate Body and referenced by the Panel below[131] – "would directly and manifestly contradict the basic rules of English grammar."[132]

111. Moreover, the EC's grammatical argument serves no purpose unless it is further accepted that the text of Article 2.4.2 is not expressly limited in its application to an investigation to determine the existence of margins of dumping pursuant to Article 5. However, as the Panel noted, the Appellate Body's found in *US – Softwood Lumber Dumping* that the phrase "during the investigation phase" operates to *limit* the applicability of Article 2.4.2, thereby directly contradicting the conclusion the EC attempts to advance with reference to its grammatical argument.[133]

112. The Panel found that the EC's grammatical argument required erasing the distinction in meaning between the wording of "investigation phase" used in Article 2.4.2 and "period of

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[128] EC Appellant Submission, paras. 175 *et seq*.; Panel Report (Dissent), para. 9.17.
[129] EC Appellant Submission, para. 177.
[130] EC Appellant Submission, para. 178.
[131] Panel Report, paras. 7.153 and note 245 (citing to *US – Softwood Lumber Dumping (AB)*, para. 76).
[132] EC Appellant Submission, para. 179.
[133] Panel Report, para. 7.153, last sentence.

investigation" used elsewhere in Article 2.[134] Moreover, even if the phrase "during the investigation phase" were to be written out of paragraph 2.4.2 and "period of investigation" were to be written in – as the EC argues should be done in effect – the text of Article 2.4.2 would continue to limit the provision to an investigation to determine the existence of dumping under Article 5. There is no period of time during which the existence of dumping is relevant under the AD Agreement other than the period examined during the investigation described in Article 5. There is no inquiry conducted under the Agreement that seeks to establish the existence of dumping other than the investigation conducted pursuant to Article 5. Thus, whether the phrase "during the investigation phase" modifies "existence" or "established," it is clear that the Article 2.4.2 disciplines the methodologies used by an authority charged with determining whether the existence of dumping has been established so as to warrant the imposition of an antidumping duty.[135]

9. Summary

113. For reasons set forth above, the Panel correctly interpreted Article 2.4.2 as being limited to an investigation conducted pursuant to Article 5. Accordingly, the Appellate Body should affirm the Panel's findings that the United States did not act inconsistently with Article 2.4.2 by declining to make offsets in the administrative reviews at issue.

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[134] Panel Report, note 245.

[135] The EC contends that in the drafts prior to the final Dunkel Draft, the movement of the words "during the investigation" from the end of the first sentence in what would be Article 2.4.2 to its current position demonstrates that this phrase must refer to "the existence of margins of dumping." EC Appellant Submission, para. 184. The EC, however, can point to no specific rule of English grammar that would compel such an interpretation.

C. Article 2.4 of the AD Agreement Does Not Require Offsets

114. In addition to arguing (incorrectly) that Article 2.4.2 requires the provision of offsets in assessment proceedings, the EC argues that offsets are required by Article 2.4 of the AD Agreement. As demonstrated below, the Panel correctly rejected the EC's arguments.

1. The "Fair Comparison" Language in the First Sentence of Article 2.4 Does Not Require Offsets

115. The EC argues that the U.S. method of assessing antidumping duties is "inherently biased," because it results in a higher margin of dumping than if the United States granted offsets for those export transactions that exceed normal value.[136] As such, the EC considers the methodology applied by the United States in the challenged assessment proceedings to be inconsistent with the fair comparison requirement of Article 2.4.

116. The Panel, however, properly analyzed the "fair comparison" requirement of Article 2.4, and concluded that the United States had not acted in an "unfair" manner in the assessment proceedings at issue. The Panel correctly recognized that "fairness," as a substantive rule, cannot be determined based solely on the size of the resulting margin of dumping.[137] Moreover, because the concept of "fairness" involves a subjective judgment, the drafters could not have left the meaning of the fair comparison requirement totally indeterminate, with the content of the requirement to be established through the dispute settlement process – a process that is not supposed to add to or diminish the rights of Members.[138] Rather, whether a certain methodology

[136] EC Appellate Submission, para. 86.
[137] Panel Report, para. 7.260.
[138] DSU, Articles 3.2 and 19.2.

is fair must be determined based upon the substantive rules contained within the AD Agreement.[139]

117. Properly interpreted, Article 2.4 is not indeterminate. The elements of a fair comparison are clear from the examples given in Article 2.4: adjustments for differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, etc. Thus, the EC's claim that Article 2.4 provides a textual basis for an obligation to provide offsets is contradicted by the text of Article 2.4. If, in fact, the Members had agreed that not providing offsets constituted the denial of a fair comparison, then offsets for non-dumped sales certainly would have been specifically identified, along with the list of appropriate adjustments for differences in terms and conditions of sale, taxation and the rest. It simply is not credible to maintain that, in concluding the AD Agreement, Members agreed that Article 2.4 requires offsets, but at the same time decided that this agreement did not merit an express reference in the text of Article 2.4.

a. The Text of Article 2.4 Does Not Require Offsets

118. In order to determine whether the United States acted consistently with the "fair comparison" obligation in its assessment proceedings, one must start with the text of Article 2.4, which provides as follows:

> A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. In the cases referred to in paragraph 3 of Article 2, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits

[139] Panel Report, para. 7.261.

> accruing, should also be made. If in these cases, price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

The "brute fact" that one methodology yields a higher margin of dumping than another is an insufficient basis to conclude that the methodology is "unfair" pursuant to the AD Agreement.[140] Rather, "fairness," as understood in Article 2.4 as a legal rule, "must necessarily be determined having regard to the particular context within which that rule operates."[141] Article 2.4 refers to

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[140] Panel Report, para. 7.260. The EC argues that the denial of offsets is unfair within the meaning of Article 2.4 because it results in a higher margin of dumping than if offsets were granted. EC Appellant Submission, para. 86. However, if the methodology is permitted by the AD Agreement, then that methodology cannot be "unfair" simply because it results in a margin of dumping higher than that which would otherwise be obtained. *See*, *e.g.*, *EC – Bed Linen (Panel)*, para. 6.100 (reasoning that the use of a particular profit rate was not unreasonable simply because it was higher than other options). For example, Article 2.4.2 expressly permits Members to use either an average-to-average comparison methodology or a transaction-to-transaction comparison methodology and does not provide any hierarchy or criteria for selecting between the two. If the size of any resulting margin of dumping is the basis for determining whether the selection of a comparison methodology is "fair" during the investigation phase, authorities would have to determine at least two margins of dumping for each exporter, using each of the two comparison methodologies – and possibly a third margin of dumping if the conditions of the second sentence of Article 2.4.2 have been alleged – and rely on the methodology that generates the lowest margin. The text of the AD Agreement imposes no such results-driven obligation.

[141] Panel Report, para. 7.260. In this regard, the United States notes that the Panel reasoned that the fair comparison obligation is not exhausted by the remainder of Article 2.4, but instead has application beyond ensuring price comparability. *Id*. at para. 7.253. The United States respectfully disagrees with the Panel's reasoning. The first sentence of Article 2.4 creates a general obligation for an authority to make appropriate adjustments to ensure that export prices and normal values are comparable before margin calculations are undertaken. It cannot be divorced from the remainder of Article 2.4. The remainder of Article 2.4 is exemplary of the types of adjustments that an authority is obliged to make in pursuit of price comparability.

This interpretation of Article 2.4 is consistent with its drafting history. In what is known as the "Dunkel Draft," Article 2.4 read as follows: "A fair comparison shall be made between the export price and the normal value. The two prices shall be compared at the same level of trade ... ." In the final version, however, the language was amended and removed any ambiguity

the comparison that is to made in order to determine whether dumping exists. Thus, "fairness,"as used as a concept in Article 2.4, must be understood as referring to an appropriate basis for comparing export price and normal value.[142] As the Panel found: "The fairness of the methodology logically cannot be divorced from the underlying conception of what dumping means."[143] Thus, any determination of whether a certain methodology results in a "fair comparison" must start with the standards contained "within the four corners of the *AD Agreement*" that govern what is considered to be appropriate in determining the margin of dumping.[144] In light of the subjective nature of the ordinary meaning of the term "fair," that term must be interpreted in a manner consistent with other obligations in the AD Agreement.[145]

b. "Fairness" Does Not Require Symmetrical Comparisons

119. Turning to the other obligations in the AD Agreement, the EC's asserted interpretation of Article 2.4 is inconsistent with Article 2.4.2. Article 2.4.2 establishes the normal rule that, during the investigation phase, the comparison of normal value and export or constructed export price must be symmetrical (*i.e.*, either average-to-average or transaction-to-transaction). That is, if an authority uses averages of normal values, the authority must also use averages of export transactions. Similarly, an authority must compare individual export transactions with a normal value based on individual transactions. Thus, as an initial matter, if "fairness" requires

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as to whether the first sentence was free-standing. The final draft reads, "A fair comparison shall be made between the export price and the normal value. *This comparison* shall be made at the same level of trade ... ." (Emphasis added). Substitution of the phrase "this comparison" establishes a reference back to the subject of the prior sentence; *i.e.*, a fair comparison, which is what is being defined.

[142] Panel Report, para. 7.260.

[143] Panel Report, para. 7.260 (footnote omitted).

[144] Panel Report, para. 7.260 (footnote omitted).

[145] Panel Report, para. 7.261.

"symmetry" in comparisons, there would be no need for the first sentence of Article 2.4.2 to establish symmetrical comparisons as the normal rule during the investigation phase.

120. Moreover, the second sentence of Article 2.4.2 expressly permits the use of asymmetrical comparisons under certain circumstances. This average-to-transaction comparison methodology is an exception to the normal rule of symmetrical comparisons during the investigation phase. However, it is not an exception to the "fair comparison" requirement of Article 2.4. Thus, asymmetry alone cannot be considered to be inconsistent with the "fair comparison" requirement.[146]

121. Relying on Article 30(2) of the VCLT, the EC argues that Article 2.4 must prevail in the case of a conflict between Article 2.4.2 and Article 2.4, because Article 2.4.2 is "[s]ubject to the provisions governing fair comparison in paragraph 4."[147] The EC is wrong for several reasons.

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[146] In several instances, the EC contends that the purpose of an antidumping measure is to address "international price discrimination" between the export market and the home market, arguing that such discrimination is impossible to measure if the methodologies for defining the measuring price in the two markets are different. *See* EC Appellant Submission, paras. 6, 31, 34, 85. Of course, the words "international price discrimination" do not appear in the AD Agreement. Moreover, regardless of the economic rationale posited by the EC for the right to impose antidumping duties, the AD Agreement establishes the obligations that accompany that right. These obligations include the permissible methods for establishing export price and normal value. The relevant question for this dispute is whether the United States has acted consistently with these obligations as they appear in the AD Agreement.

At any rate, the EC's argument appears to be nothing more than a contention that, in order to measure "international price discrimination," a Member must use the "symmetrical" average-to-average or transaction-to-transaction comparison methods. However, the AD Agreement specifically provides for the use of the "asymmetrical" average-to-transaction comparison method in the investigation phase under certain circumstances. Moreover, as the obligations of Article 2.4.2 are limited to the investigation phase, the AD Agreement does not specify the comparison methods to be used after an antidumping duty has been imposed. Thus, the EC's theory concerning "international price discrimination" is divorced from the text of the AD Agreement, and, for that reason alone, is of no avail.

[147] EC Appellant Submission, para. 137.

122. First, Article 30(2) provides that "when *a treaty* specifies that it is subject to, or that it is not to be considered as incompatible with, *an earlier or later treaty*, the provisions of that *other treaty* prevail." (Emphasis added). Article 30(2) expressly relates to a conflict between two or more individual treaties. Here, the alleged conflict involves the interpretation of different provisions within the same agreement, the AD Agreement. Thus, Article 30(2) is inapplicable.

123. Nonetheless, even if Article 30(2) did apply to allegedly conflicting language within the same agreement, the EC's argument would still fail, because Articles 2.4 and 2.4.2 are not in conflict. Article 2.4 sets forth the considerations for determining price comparability, whereas Article 2.4.2 sets forth the comparison methods to be applied after price comparability has been established. In other words, the overall margin calculation is subject to the considerations affecting price comparability.

124. In fact, the EC argument is premised entirely on an interpretation that creates a conflict between Articles 2.4 and 2.4.2. As such, it is inconsistent with the presumption in public international law against conflicts, and for that reason alone should be rejected.[148] The Panel agreed, finding "that the correct approach, consistent with the principle of presumption against conflict in the interpretation of treaty provisions, is to interpret fair comparison in a manner that *avoids* conflict with other provisions of the AD Agreement."[149]

125. As demonstrated above, the obligations of Article 2.4.2 are expressly limited to establishing the existence of margins of dumping during the investigation phase. No provision

[148] *See Indonesia – Autos*, note 649, and the materials cited therein.
[149] Panel Report, note 367 (emphasis in original).

in the AD Agreement prohibits the use of the average-to-transaction comparison method in assessment proceedings.

126. This conclusion is supported by Article 9.4 of the AD Agreement, which expressly references the prospective normal value assessment system. Under such a system, to determine the antidumping duty to be levied on a specific export transaction, a Member may compare that transaction to a prospective normal value based on a weighted-average.[150] Because prospective normal value assessment systems are expressly permitted by the AD Agreement, they cannot be regarded as inherently unfair or otherwise inconsistent with Article 2.4, notwithstanding the fact that they rely on a comparison between average normal values and individual export prices.[151]

127. Nevertheless, the EC essentially argues that a fair comparison requires the calculation of a margin of dumping based on averages.[152] In Exhibit EC-39, the EC gives as an example a situation where normal value is $100 and no antidumping liability is created where an exporter sells 1000 units of a product at an average price of $100 per unit in one large transaction.[153] In a different example, antidumping duty liability is created if another exporter engages in five transactions, also selling 1000 units, but at different prices in each transaction, the average of which is equal to $100.[154]

128. However, the EC's examples are irrelevant. By juxtaposing the results of average-to-average comparisons with average-to-transaction comparisons, the EC seeks to suggest that the

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[150] *See* Panel Report, paras. 7.205-7.206 and 7.264.

[151] The EC's argument about the relationship between prospective normal value systems and Article 9.3.2 is addressed in Section IV.E.2, below.

[152] EC Appellant Submission, paras. 86 *et seq*.

[153] EC Appellant Submission, para. 89.

[154] *Id*.

average-to-average comparison constitutes a benchmark against which the results of any other comparison method should be measured. That is not the case. Even in an investigation, in which Article 2.4.2 is applicable, the averaging of export prices is not required for two of the three possible comparison methods. Moreover, once the investigation phase is ended and an antidumping duty is imposed, Article 2.4.2 is not applicable and there is no textual basis whatsoever for treating the results of average-to-average comparisons as a benchmark for judging the "fairness" of an assessment methodology.

129. Indeed, applying these principles to the EC's examples in Exhibit EC-39, the first exporter, having sold 1000 units at a price of $100 per unit, equal to the normal value, did not dump. Thus, there is no liability for antidumping duties. With respect to the second exporter, however, it sold some of its units at a price above normal value, and some below.[155] For those export transactions sold at below normal value, the exporter engaged in dumping, and thus antidumping duty liability exists to the extent that those transactions were sold at less than normal value. Far from being "unfair," this outcome is expressly permitted by Article 9.

c. "Fairness" Does Not Require Offsets

130. Just as the "fair comparison" requirement does not prohibit average-to-transaction comparisons, it also does not require Members to provide offsets for non-dumped export transactions.

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[155] In its discussion of Exhibit EC-39, the EC sometimes refers to "sales" and sometimes to "shipments." EC Appellant Submission, para. 89. The AD Agreement is concerned with sales. Thus, to the extent exporter B made multiple sales at varying prices, it is unremarkable that the result is different than if the exporter had made one sale that was shipped in five separate installments.

131. The Panel found that offsets are required during the investigation phase when an authority uses the average-to-average comparison methodology pursuant to Article 2.4.2.[156] This obligation to provide for offsets stems from the obligation to include "all comparable export transactions." However, by the express terms of Article 2.4.2, its obligations are limited to the investigation phase and are not applicable to assessment proceedings.[157] As the Panel noted, to the extent that the language of Article 2.4.2 requires the provision of offsets when the average-to-average comparison method is used during the investigation phase, the limitation of that requirement to the investigation phase supports the conclusion that offsets are not required in all circumstances.[158] As the Panel concluded: "In fact, the very rationale for the existence of Article 2.4.2 is undermined if asymmetry and zeroing are already proscribed in all circumstances as practices inherently unfair by Article 2.4."[159]

132. Once again, the availability under the AD Agreement of the prospective normal value system of antidumping duty assessment supports the conclusion that Article 2.4 does not require offsets. Prospective normal value systems operate as variable duty systems – the antidumping duty is determined by comparing the price to a prospective normal value for the particular type or model being imported. Where the export price is less than the prospective normal value, the difference is assessed as the antidumping duty. Where the export price is greater than the prospective normal value, the importer has no antidumping duty liability for that transaction. The Member has no obligation to provide the importer with a credit for the amount by which that

[156] Panel Report, para. 7.263.
[157] Panel Report, para. 7.263.
[158] Panel Report, para. 7.263.
[159] Panel Report, para. 7.263.

transaction exceeds normal value or to otherwise reduce the amount of antidumping duties that may be assessed based on other non-dumped imports. In other words, such a variable duty assessment necessarily means that one export transaction sold at greater than normal value does not affect the antidumping duty liability accruing on a different export transaction that is dumped.[160] Thus, because the denial of offsets is permitted in such situations, it cannot be said that the denial of offsets itself is "unfair" under Article 2.4.

2. Article 2.4 Does Not Require the Calculation of a Dumping Margin on the Basis of the "Product as a Whole"

133. On appeal, the EC argues that either Article VI of GATT 1994 or Article 2.1 of the AD Agreement creates an obligation to calculate the margin of dumping for the product as a whole. The United States responds to this argument in Section IV.E, below. However, the EC also seeks to create such an obligation pursuant to the "fair comparison" requirement of Article 2.4. As demonstrated below, the EC's arguments are without merit.

a. A "Fair Comparison" Does Not Entail the Determination of a Margin of Dumping for the Product as a Whole

134. The EC argues that the obligation to make a fair comparison under Article 2.4 includes an obligation to consider all comparable export transactions during a selected period whenever an authority calculates margins of dumping.[161] The EC's argument is wrong, because it would render other provisions of the AD Agreement redundant.

135. First, any obligation to calculate margins of dumping for the product as a whole stems from the use of the average-to-average comparison methodology during the investigation phase

[160] Panel Report, para. 7.264.
[161] EC Appellant Submission, paras. 75, 78, 79, 80.

pursuant to Article 2.4.2. This obligation is grounded in the phrase "all comparable export transactions" in the first sentence of Article 2.4.2, and applies only to the use of the average-to-average comparison method during the investigation phase. As such, the obligation does not apply to assessment proceedings. If the fair comparison requirement of Article 2.4 were interpreted so as to impose the same obligation, the first sentence of Article 2.4.2 would be redundant.

136. Second, the argument that the fair comparison requirement of Article 2.4 requires the consideration of multiple export transactions during a selected time period cannot be reconciled with the ability of Members to assess antidumping duties on individual import transactions. Article 2.4 is a general obligation that applies to all instances where a Member calculates a margin of dumping. If Article 2.4 required the use of multiple export transactions in order to calculate the antidumping duties to be assessed, this would mean that Members could not adopt a system that assessed antidumping duties on individual exports. However, Article 9.4 clearly permits a Member to use a prospective normal value assessment system in which a Member compares a single export transaction to a prospective normal value to determine the antidumping duty. Thus, it would be wrong to read into the "fair comparison" requirement a requirement to calculate margins of dumping only on the basis of the product as a whole.

b. The Appellate Body Has Never Found an Obligation to Provide for Offsets Stemming from the "Fair Comparison" Requirement of Article 2.4

137. The Appellate Body reports upon which the EC relies do not support its argument that the fair comparison requirement of Article 2.4 requires the calculation of dumping margins based upon the "product as a whole."

138. In *EC – Bed Linen (AB)*, the Appellate Body found that the EC had an obligation to provide offsets arising out of the use of the average-to-average comparison method in an investigation pursuant to Article 2.4.2.[162] The Appellate Body, however, made no findings with respect to Article 2.4. The Appellate Body focused its analysis on the fact that Article 2.4.2 requires authorities to "compare the weighted average normal value with the weighted average of prices of all comparable export transactions."[163] While the Appellate Body report contains a conclusory sentence regarding the "fair comparison" requirement, the report contains no textual analysis of the "fair comparison" requirement, no explanation as to how or why the method used by the EC was unfair, and no finding with respect to Article 2.4.[164] The basis for the Appellate Body's finding with respect to an offset requirement was limited to the need for an authority to account for "all comparable export transactions" in the application of the average-to-average comparison method.[165]

139. In *US – Corrosion-Resistant Steel Sunset Review (AB)*, the Appellate Body was "unable to rule" on whether the United States acted inconsistently with Article 2.4 and Article 11.3.[166]

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[162] *EC – Bed Linen (AB)*, para. 66.
[163] *EC – Bed Linen (AB)*, para. 55.
[164] *EC – Bed Linen (AB)*, para. 55.
[165] *EC – Bed Linen (AB)*, paras. 55-60.
[166] *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 138.

While the EC cites to statements in *US – Corrosion-Resistant Steel Sunset Review (AB)* regarding the "fair comparison requirement," these statements were made without any analysis of the text of the AD Agreement, did not provide any reasoning beyond reference to the *EC – Bed Linen (AB)* report, and were made in the context of a dispute in which the Appellate Body was unable to "complete the analysis."

140. Moreover, in *US – Corrosion-Resistant Steel Sunset Review (AB)*, the Appellate Body specifically referred to "a zeroing methodology such as that examined in *EC – Bed Linen* ... ." Because in *EC – Bed Linen (AB)* the Appellate Body examined the EC's use of the average-to-average comparison method to determine the existence of margins of dumping during the investigation phase pursuant to Article 2.4.2, the reference in *US – Corrosion-Resistant Steel Sunset Review (AB)* was to the use of the average-to-average comparison method during the investigation phase. It was not a reference to the use of any other method, such as the use of average-to-transaction comparisons in an Article 9.3 assessment proceeding. In fact, in the DSU Article 21.5 proceeding in *EC – Bed Linen*, the Appellate Body recognized that the "requirements of Article 9 do not have a bearing on Article 2.4.2 because the rules on the determination of the margin of dumping are distinct and separate from the rules on the imposition and collection of anti-dumping duties."[167] Accordingly, *US – Corrosion-Resistant Steel Sunset Review (AB)* provides no basis for concluding that the fair comparison requirement establishes an independent obligation to provide offsets.

141. In *US – Softwood Lumber Dumping (AB)*, the Appellate Body specifically recognized that the issue before it was whether offsets were required pursuant to the average-to-average

[167] *EC – Bed Linen (Article 21.5) (AB)*, para. 124.

method found in Article 2.4.2.[168] The basis for its finding was the obligation in Article 2.4.2 that "the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of *a weighted average normal value with a weighted average of prices of all comparable export transactions ...* ."[169] At no point in *US – Softwood Lumber Dumping (AB)* did the Appellate Body reference or rely upon Article 2.4 as part of its analysis. Furthermore, even though the parties in that dispute referenced the other comparison methods described in Article 2.4.2 in their arguments, the Appellate Body declined to address any obligation to provide offsets in any context other than that of the average-to-average comparison method before it.[170]

142. Belying the EC's mischaracterization of the Appellate Body's prior findings as speaking to an offset requirement pursuant to the "fair comparison" requirement of Article 2.4, in *US – Softwood Lumber Dumping (AB)* the Appellate Body expressly indicated that the scope of its findings were limited:

> [I]n this appeal, we are not required to, and do not address, the issue of whether zeroing can, or cannot, be used under the other methodologies prescribed in Article 2.4.2, namely, comparing normal value and export prices on a transaction-to-transaction basis (the "transaction-to-transaction methodology"), or comparing a normal value established on a weighted average basis to prices of individual export transactions (the "weighted-average-to-individual methodology").[171]

Indeed, the Appellate Body subsequently stated that it could not consider the U.S. contextual arguments based on the transaction-to-transaction and average-to-transaction comparison

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[168] *US – Softwood Lumber Dumping (AB)*, paras. 104, 105, 108.

[169] AD Agreement, Art. 2.4.2 (Emphasis added). *See US – Softwood Lumber Dumping (AB)*, paras. 82, 86, 98.

[170] *US – Softwood Lumber Dumping (AB)*, paras. 104-105.

[171] *US – Softwood Lumber Dumping (AB)*, para. 63.

methodologies "without examining first whether zeroing is permitted under those methodologies."[172] In recognizing that it would first be necessary to determine whether offsets are required pursuant to those comparison methodologies, the Appellate Body implied that the "fair comparison" requirement of Article 2.4 does not require offsets. Both the transaction-to-transaction and average-to-transaction comparison methodologies are subject to the fair comparison requirement. Therefore, if that requirement addressed the offset issue, the Appellate Body's stated reasoning for not considering the U.S. argument would have been inapplicable. Thus, the Appellate Body's own statements contradict the EC's suggestion that the Appellate Body has found an obligation to provide offsets in any context other than one involving the use of the average-to-average method in an investigation.

3. The EC's Interpretation of Article 2.4 Would Nullify the Second Sentence of Article 2.4.2

143. If a general obligation to provide offsets for non-dumped export transactions existed, pursuant either to the "fair comparison" obligation of Article 2.4 or pursuant to the EC's "product as a whole" argument, such an obligation would render the second sentence of Article 2.4.2 a nullity. The second sentence of Article 2.4.2 provides an alternative comparison method (average-to-transaction) that may be used when certain conditions have been met, including an explanation by the authority as to why the conditions cannot be taken into account appropriately by the use of the comparison methods described in the first sentence of Article 2.4.2. The second sentence provides an exception to the normal rule that is specifically designed to produce a different result in situations commonly referred to as "targeted dumping."

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[172] *US – Softwood Lumber Dumping (AB)*, para. 105.

144. However, while the comparison method of the second sentence is an exception to the methods set forth in the first sentence, it is not an exception to the fair comparison requirement of Article 2.4. Thus, if, as argued by the EC, Article 2.4 requires the provision of offsets, then offsets must be made when the average-to-transaction comparison method of the second sentence is used. The problem for the EC is that if offsets are made using the average-to-transaction comparison method, then as a matter of mathematics the result will be the same as if an average-to-average comparison method were used.

145. The same is true if an authority were required to provide offsets due to an obligation to calculate the margin of dumping for the "product as a whole," as posited by the EC with respect to Article 2.1 of the AD Agreement and Article VI of the GATT 1994. Such a requirement would apply to the second sentence of Article 2.4.2 as well, and, as a matter of mathematics, the results using the average-to-transaction method would be the same as those generated under the average-to-average comparison method.[173]

146. In any event, regardless of the rationale, if offsets were required based on some generally applicable provision of the AD Agreement, the overall dumping margin calculated for an exporter under either the average-to-average method or the average-to-transaction method must, mathematically, be the same. The reason for this equivalence is that, if offsets are required, then

[173] If the textual basis for an obligation to provide offsets is to be found in the generally applicable provisions of Article 2.1 and/or 2.4 of the AD Agreement, then this obligation must be demonstrated to be consistent with all of the actions to which these provisions apply. If, however, an obligation to provide offsets cannot be reconciled with the provisions relating to any of these actions, it follows that these provisions cannot be the source of the obligation to provide offsets. In this regard, it is not necessary to demonstrate that an obligation to provide offsets is inconsistent with every proceeding to which Articles 2.1 and 2.4 apply in order to demonstrate that the textual basis for any such obligation to offset must lie elsewhere.

all non-dumped sales (*i.e.*, negative values) will offset the dumping found on all of the dumped sales (*i.e.*, positive values). In both cases, the sum total of the positive values will be offset by the sum total of the negative values, and the results will be the same.[174]

147. This can seen from the following example:

[174] It might be argued that the second sentence of Article 2.4.2 might be given meaning if there were some other methodological distinctions utilized by an authority that caused the results of the average-to-average method and the average-to-transaction method to differ. For example, some might point out that the United States uses monthly average normal values in making average-to-transaction comparisons and annual average normal values in making average-to-average comparisons. Such an example is misplaced, however, because monthly average normal values are employed by the United States in assessment proceedings. The second sentence of Article 2.4.2 applies only during the investigation phase. Moreover, as an interpretive matter, such speculation cannot resolve the internal textual inconsistency identified by the Panel. Panel Report, para. 7.266. The text and structure of the AD Agreement make a clear distinction between the average-to-average and average-to-transaction comparison methods. This clear distinction is rendered meaningless unless the comparison methods, in and of themselves, provide distinct results.

Table 2

Model	NV	EP	Amount of Dumping Average-to-Average		Amount of Dumping Average-to-Transaction
			per unit	total by model	
A	10	10			0
A	10	8			2
A	10	7			3
Model A Average	**10**	**8.33**	**1.67**	**5**	
B	11	11			0
B	11	10			1
B	11	13			-2
Model B Average	**11**	**11.33**	**-0.33**	**-1**	
C	9	9			0
C	9	8			1
C	9	7			2
C	9	8			1
Model C Average	**9**	**8**	**1**	**4**	
	Total	91	Total Dumping with offsets	8	Total Dumping with offsets 8
			as a percentage	8.79%	8.79%

148. This example assumes that there are three models of the product subject to an antidumping investigation. The average normal value for model A is $10, the average normal value of model B is $11, and the average normal value for model C is $9. The chart assumes three export transactions of model A, at prices of $10, $8 and $7. The average of these three export transactions is $8.33. Thus, based on an average-to-average methodology, the amount of

dumping equals $1.67 per unit. Similarly, for model B, if there are three export transactions sold at $11, $10 and $13, there is no dumping and the export transactions exceed normal value, on average, by $0.33. For model C, where there are export transactions sold at $9, $8, $7 and $8, the per unit amount of dumping is $1.00. Under this methodology, if all export transactions are considered, the margin of dumping as a percentage of the total value of all exports equals 8.79 percent.

149. If each individual export transaction is compared to an average normal value for that specific model, each transaction results in a dumping amount (or excess over normal value, stated as a negative amount) of $0, $2, $3, $0, $1, -$2, $0, $1, $2, and $1. If offsets are required, then all of these dumping amounts must be aggregated, yielding a total amount of dumping of $8. If this is expressed as a percentage of the total value of all export transactions ($91), the resulting margin of dumping is again 8.79 percent.[175]

150. The Panel correctly found that it could not interpret the AD Agreement in such a way as to nullify the second sentence of Article 2.4.2.[176] If the denial of offsets were considered "unfair," it would have to be considered "unfair" in all circumstances. In that case, the second sentence would be denied "the very function for which it was created," because, as a matter of mathematics, the average-to-transaction comparison method of the second sentence could not produce a result different from the result produced by the average-to-average comparison method of the first sentence.[177]

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[175] If offsets are not required, then under the average-to-transaction methodology, the total amount of dumping would be $10, which, if expressed as a percentage of the total value of all export transactions, would equal 10.99 percent.

[176] Panel Report, para. 7.266.

[177] Panel Report, para. 7.266.

4. The Denial of Offsets is Not an Undue Price Adjustment Pursuant to Article 2.4

151. As discussed above, the EC argues that the fair comparison requirement of Article 2.4 requires offsets. At the same time, however, the EC argues, as it did before the Panel, that when the average-to-comparison method is used pursuant to the second sentence of Article 2.4.2, a Member may make a price adjustment pursuant to Article 2.4 so as *not* to offset or reduce the margin of dumping based on the extent to which some export prices were greater than normal value.[178] The Panel rejected this argument as reflecting "a misinterpretation of the very concept of price comparability as used in Article 2.4 of the *AD Agreement*."[179] Remarkably, in the same submission in which the EC argues that it is permissible to deny offsets under the conditions of the second sentence of Article 2.4.2, the EC also asserts that denying offsets under any other circumstance is somehow an undue price adjustment, inconsistent with the third through fifth sentences of Article 2.4.[180] Neither argument is correct.

152. Turning first to the EC's argument that the denial of offsets pursuant to the average-to-transaction comparison method of the second sentence of Article 2.4.2 constitutes a price

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[178] *See* EC Appellant Submission, para. 142.

[179] Panel report, para. 7.279.

[180] EC Appellant Submission, paras. 102 *et seq*. In this regard, the Appellate Body may recall that, at the oral hearing in *US – Softwood Lumber Dumping*, the EC acknowledged in its closing statement that "zeroing" is not inherently unfair, apparently recognizing the need to preserve the use of "zeroing" in situations involving the second sentence of Article 2.4.2. *See* U.S. First Answers, para. 51. Thus, the area of disagreement between the United States and the EC is focused on identifying the precise textual basis that makes "zeroing" impermissible in investigations using the average-to-average comparison method, but that permits "zeroing" pursuant to the second sentence of Article 2.4.2. Consistent with the language used by the Appellate Body in its prior reports, associating the prohibition against "zeroing" with the "all comparable export transactions" language in the first sentence of Article 2.4.2 resolves the disagreement.

adjustment that can be reconciled with Article 2.4,[181] the Panel considered this argument and properly rejected it.[182] Article 2.4 concerns a "fair comparison . . . between the export price and normal value." As such, Article 2.4 creates an obligation to make "[d]ue allowances . . . for differences which affect price comparability ... ." The differences that Article 2.4 addresses are the differences between two different markets: the export market and the market in which normal value is determined. Thus, if the like product in the market of the exporting country is subject to a tax that is not present in the export market, one of the prices must be adjusted to remove the effect of the tax. Similarly, if the like product sold in the market of the exporting country has some different physical characteristics, an adjustment must be made to address those differences.

153. The second sentence of Article 2.4.2, by contrast, does not focus on the differences between the export market and the market in which normal value is determined. Instead, the second sentence of Article 2.4.2 focuses on a pattern of different prices within the export market. Such differences within the export market are "conceptually wholly irrelevant to, and outside the scope of, Article 2.4."[183] Differences in prices among different regions of the export market, among different purchasers in the export market, or during different time periods within the export market "have nothing to do with whether or not export sales and domestic sales are comparable ... ."[184] Accordingly, there is no basis in the AD Agreement to consider that, when

[181] EC Appellant Submission, para. 142.
[182] Panel Report, paras. 7.277-80.
[183] Panel Report, para. 7.279.
[184] Panel Report, para. 7.279.

using the "targeted dumping" methodology of the second sentence, the denial of offsets constitutes a due adjustment addressing price comparability consistent with Article 2.4.

154. The Panel also rejected the suggestion that the denial of offsets, or "zeroing," could be characterized as a permissible adjustment in one circumstance, and impermissible in another:

> If zeroing is characterized as an impermissible allowance or adjustment, there is no rational basis to explain why an allowance or adjustment that is prohibited because it does not correspond to a difference affecting price comparability is no longer prohibited in the context of the asymmetrical comparison method provided for in the second sentence of Article 2.4.2 or in the context of a duty assessment proceeding under Article 9.[185]

Consistent with the Panel's analysis, if the denial of offsets is considered an undue price adjustment, it would be "undue," and therefore impermissible, for all three comparison methods described in Article 2.4.2. As demonstrated above, however, such an interpretation would have the effect of nullifying second sentence of Article 2.4.2.

155. Nevertheless, we now turn to the EC's argument that the denial of offsets outside the context of the second sentence of Article 2.4.2 constitutes an undue price adjustment. As an initial matter, the focus of Article 2.4 is on the manner in which authorities select transactions for comparison and make the appropriate adjustments for differences that affect price comparability. As the panel in *Egypt – Rebar* explained:

> [A]rticle 2.4 in its entirety, including its burden of proof requirement, has to do with ensuring a fair comparison, through various adjustments as appropriate, of export price and normal value.[186]

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[185] Panel Report, para. 7.277.
[186] *Egypt – Rebar*, para. 7.335.

The panel's discussion in *Egypt – Rebar* of the scope of the fair comparison language was expressly quoted and supported by the panel in *Argentina – Poultry*.[187]

156. Indeed, every Appellate Body and panel report that has turned on the question of price comparability has narrowly interpreted Article 2.4 to address pre-comparison price adjustments that affect the comparability of prices between markets.[188] The panel in *US – Softwood Lumber Dumping* summarized the scope of Article 2.4 when it found:

> An examination of a request for an Article 2.4 adjustment should therefore start with a determination of whether a difference between the export price and the normal value exists. That is, a difference between the price at which the like product is sold in the domestic market of the exporting country and that at which the allegedly dumped product is sold in the importing country. *Ultimately, this provision requires that differences exist between two markets. If there is no difference affecting the products sold in the markets* concerned, for instance, where the packaging of the allegedly dumped product and that of the like product sold in the domestic market of the exporting country is identical, in our view, *an adjustment would not be required to be made by that provision.*[189]

Accordingly, as the Appellate Body stated in *US – Hot-Rolled Steel (AB)*, "an examination of whether USDOC acted consistently with Article 2.4 of the Anti-Dumping Agreement must focus on . . . whether there were 'differences', relevant under Article 2.4, which affected the comparability of export price and normal value."[190]

157. Thus, an adjustment is some addition or subtraction that is made to a specific price due to some characteristic of the sale in order to make the price comparable to some other price. Examples listed in Article 2.4 include "differences in conditions and terms of sale, taxation,

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[187] *Argentina – Poultry*, para. 7.265
[188] *See, e.g., Argentina – Poultry*, para. 7.265; *Egypt – Rebar*, para. 7.269.
[189] *US – Softwood Lumber Dumping (Panel)*, para. 7.356 (emphasis added).
[190] *US – Hot-Rolled Steel (AB),* para. 179.

levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability." Thus, for example, if there is a tax on the goods present in the price at which normal value is determined, and no such tax with respect to the export transaction, pursuant to Article 2.4, an adjustment is made prior to the comparison.

158. In the assessment proceedings at issue, the United States made no price adjustments to account for the extent to which an export price was greater than normal value. Indeed, the United States could not even know if a particular export transaction was sold at a price greater than normal value until it compared that price with another price, after adjustments had been made for conditions affecting price comparability. As stated above, the United States simply was determining which export transactions were sold at less than normal value, and thus which export transactions gave rise to antidumping duties for which the importer was liable. Not reducing that duty because other sales were made at greater than normal value is not a price adjustment. Accordingly, the EC's argument is based entirely on a factual inaccuracy.

5. The EC's Interpretation of the Second Sentence of Article 2.4.2 Is Unsupported

159. As an alternative argument, the EC claims that "Article 2.4.2, second sentence, does not specify in every detail how an investigating authority might conduct its targeted dumping analysis."[191] To that end, the EC suggests that if an authority finds a significant pattern of export

[191] EC Appellant Submission, para. 141. The EC contends that when the United States finds one of the pricing patterns specified in the second sentence of Article 2.4.2, U.S. law provides for the determination of a margin of dumping specific to the sales making up that pricing pattern. *Id*., note 102. This is incorrect.

If a pattern of export prices is found, and other conditions have been satisfied, Commerce will normally "limit the application of the average-to-transaction method" to those sales that make up the pricing pattern. 19 CFR § 351.414(f)(2) (Exhibit EC-35.3). Contrary to the EC's suggestion, in the preamble to the regulations, in which Commerce provided explanatory

price differences with respect to two regions, the authority could simply calculate a margin of dumping for the region in which the pattern occurs.[192]

160. As discussed above, the second sentence of Article 2.4.2 establishes a condition precedent that, if met, would lead to the application of the average-to-transaction comparison method during the investigation phase. There is no textual support in Article 2.4.2 for the EC's suggestion that a Member may calculate separate antidumping duty margins based on subsets of export transactions. Article 6.10 of the AD Agreement states that "authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation." By contrast, where the drafters of the AD Agreement intended to permit an authority to consider a subset of transactions separately, they made that intention explicit. This is illustrated by the "respondent selection" language of the remaining text of Article 6.10, as well as Articles 4.1(ii) and 4.2, which deal with regional industries and dumping.

161. Specifically, the AD Agreement is explicit when it authorizes Members to consider export transactions only to a specific region. Article 4.1(ii) of the AD Agreement permits a Member to divide its territory into two or more competitive markets in order to determine

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information and justification for the regulations it promulgated, it explained that this does not mean that other export sales are excluded or segregated in the calculations. Instead, "the average-to-average method would [still] be applied to the remaining sales." *Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. 7308, 7350 (February 27, 1996) (Exhibit EC-35.1).

Applying the average-to-transaction method to the sales that make up the targeted dumping pattern, and the average-to-average method to all other sales, Commerce will include all of the sales made during the period of investigation in the calculation of the overall margin of dumping. Moreover, even with this combination of comparison methods, if offsets were required for non-dumped comparisons, the result would be the same as if all comparisons were made using the average-to-average comparison method with offsets. Thus, the second sentence of Article 2.4.2 would still be nullified and the U.S. regulations do not suggest otherwise.

[192] EC Appellant Submission, para. 141.

whether injury exists within one of those markets. When a Member has done so, Article 4.2 provides that the preference is to apply the antidumping duty only to the export transactions consigned for final consumption in that region. However, Article 4.2 recognizes that in certain instances, the constitutional law of an importing Member may not permit an antidumping duty to be applied only to export transactions destined for consumption in a specific region of the country. In such a situation, Article 4.2 permits a Member to continue to assess the antidumping duty on all export transactions destined for consumption in the entirety of its territory.

162. The second sentence of Article 2.4.2, while referring to a pattern of price differences found to exist with regard to certain regions within a country, does not provide for assessing an antidumping duty on a regional basis. Indeed, given the great lengths to which Article 4.2 goes to accommodate Members whose constitutional law does not permit an antidumping duty to be assessed on a regional basis, if the drafters had meant for the second sentence of Article 2.4.2 to be similarly applied, they would have included text similar to that found in Article 4.2.

163. Notably, the EC did not suggest comparable examples with respect to the other two bases for applying the second sentence of Article 2.4.2 – different pricing patterns among purchasers or time periods. In fact, any such examples would be both unsupported by the text of the AD Agreement and impracticable. For instance, assuming the same approach to a pattern among purchasers that the EC proposed in its example involving regional patterns, this example would entail an antidumping duty being imposed only for imports destined for purchasers to whom the exporter sold merchandise at dumped prices during the period of investigation. Such a result, however, would afford less relief for what appears to have been considered a more insidious form of dumping. Following a typical antidumping investigation, assuming that injurious

dumping is found to exist, an antidumping duty is imposed that covers ***all*** imports from the exporter, regardless of whether the purchaser previously bought dumped goods from the exporter. By contrast, in the instant scenario, using the exceptional comparison methodology of the second sentence of Article 2.4.2 to address what is commonly referred to as "targeted dumping," the EC suggests that the scope of any antidumping duty would be limited to imports by purchasers that previously bought dumped merchandise, leaving the exporter free to engage in dumping to obtain new purchasers. Such an approach is illogical and unsupported by the text.

164. In all, the EC's interpretation requires reading into the AD Agreement rights and obligations that are not supported by the text of the second sentence of Article 2.4.2. It also leads to impractical and implausible results. Moreover, that interpretation cannot be reconciled with other provisions of the AD Agreement. Therefore, the Appellate Body should reject the EC's proposed interpretation of the second sentence of Article 2.4.2.

E. There Is No "Product as a Whole" Obligation That Requires Offsets in Assessment Proceedings

165. The Panel found that, pursuant to Article 2.4.2, there is an obligation to provide offsets in the context of the average-to-average comparison method during the investigation phase. The Panel further found that Article 2.4.2 is limited to the investigation phase. Moreover, the Panel found that the "fair comparison" requirement of Article 2.4 does not impose an obligation to provide an offset with respect to actions taken after an antidumping duty is in place (*i.e.*, in assessment proceedings, sunset reviews, changed circumstance reviews, or new shipper reviews).

166. Nevertheless, the EC contends that whenever an authority determines a margin of dumping, it must be based on the "product as a whole."[193] The EC argues that even in the context of an assessment proceeding, the amount of antidumping duty assessed must be limited to the margin of dumping determined on an exporter-specific, "product-as-a-whole" basis.[194]

167. In so doing, the EC seeks to elevate a phrase that has been discussed in certain dispute settlement reports in one specific context, but which appears nowhere in the text of the AD Agreement, into an obligation informing the interpretation of numerous provisions of the AD Agreement. The EC's argument is textually unsupported, inconsistent with the panel and Appellate Body reports from which it is purportedly derived, and, if accepted, would nullify the second sentence of Article 2.4.2.

168. Paragraph 1 of Article VI of GATT 1994, recognizes "that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned" if it is injurious. The ordinary meaning of dumping derived from Article VI:1 is that dumping occurs in the course of a commercial transaction, which is both the mechanism by which the "less than normal value" export price is arrived at and the mechanism by which the product is "introduced into the commerce"of the importing country. The comparison described in Article VI is directed at the "price of the product exported," which is then determined to be either less than, or not less than, a comparable normal value taken from various sources. The ordinary meaning of "price" is the "payment in purchase of something."[195] In the ordinary course of commercial activity, a particular price is agreed to by a buyer and seller

[193] *See* EC Appellant Submission, paras. 56, 59, 61.
[194] *See* EC Appellant Submission, paras. 292, 293.
[195] *New Shorter Oxford English Dictionary* (1993), p. 2349.

for a particular quantity of merchandise under the terms of a sales transaction. If fulfillment of the transaction requires delivery of the merchandise from an exporting country to an importing country, then the transaction itself constitutes the "introduction" of the product into the commerce of the importing country. In other words, dumping – as described in Article VI:1 – may occur in a single transaction.

169. The comparison contemplated by Article VI:1 is binary in nature. If the export price is not found to be less than normal value, it is not "considered as being introduced into the commerce of an importing country at less than its normal value," and is not condemned. On the other hand, if the export price is found to be less than normal value, it is "considered as being introduced into the commerce of an importing country at less than its normal value," and, if causing injury, is to be condemned. A single dumped transaction may or may not rise to the threshold of injury required by Article VI:1. Nevertheless, if the price is less than normal value, a single transaction constitutes dumping and would support imposition of antidumping duties if the injury requirement were satisfied.

170. Once an antidumping duty is in place, paragraph 2 of Article VI provides that antidumping duties may be levied in the amount of the difference between export price and normal value. In contrast to the binary inquiry described in Article VI:1, paragraph 2 compares export price and normal value to measure the amount of antidumping duties that a party "may levy on any dumped product" in order to offset or prevent dumping. Paragraph 2 demonstrates that the remedy for dumping is to levy antidumping duties "in order to offset or prevent dumping." Thus, paragraph 2 contemplates that once an antidumping duty is in place and exporters and importers are informed that antidumping duties may be levied, dumped

transactions may be thereby prevented. Additionally, if transactions at less than normal value continue to occur, paragraph 2 provides that antidumping duties may be levied to offset the dumping. There is no suggestion in paragraph 2 that the offsetting function performed by the assessment of antidumping duties would be applicable in the case of non-dumped transactions. Thus, reading into Article VI a generally applicable offset obligation would fundamentally alter the purpose of levying antidumping duties as provided by Article VI:2.

1. The Panel Correctly Interpreted the Obligation to Determine the Margin of Dumping

171. At the heart of this issue is the proper interpretation of the terms "margin of dumping" and "margins of dumping," as used in GATT 1994 and the AD Agreement. The Panel properly interpreted these terms consistent with their ordinary meaning, in their context and in light of the object and purpose of the GATT 1994 and AD Agreement. As the Panel correctly noted: "[T]he concept of 'margin of dumping' in Article VI of GATT 1994 is defined in terms of a *price difference* in a situation in which a product is introduced into the commerce of another country at less than its normal value i.e. when the export price of the product *is less* than the normal value of the product."[196]

172. The precise parameters of the "price difference" that constitutes the margin of dumping are not specifically addressed in Article VI. Article VI does not specify how the "product" is to be defined, nor does it specify how the "price" is to be established. Article 2.4.2 of the AD Agreement represents a step toward defining some of those parameters. As discussed above, it defines the bases upon which the prices are normally to be compared in an investigation – either

[196] Panel Report, para. 7.59 (emphasis in original).

average-to-average or transaction-to-transaction. Consistent with *EC – Bed Linen (AB)* and *US – Softwood Lumber Dumping (AB)*, by establishing the basis upon which the prices are to be compared, Article 2.4.2 also implicates the determination of the "product" such that, when average-to-average comparisons are made involving "all comparable export transactions," the product necessarily includes all of those export transactions.[197] That is the point of the "integrated manner" in which the Appellate Body interpreted "all comparable export transactions" and "margins of dumping."[198]

173. The "price" to which Article VI of the GATT 1994 and Article 2.1 of the AD Agreement refer is not always the price of "all comparable export transactions." Rather, by using the word "price," the drafters permitted a Member to find a margin of dumping on a transaction-specific basis. It is well established that, prior to the AD Agreement, Contracting Parties to GATT 1947 commonly determined margins of dumping based on comparing individual export transactions with average normal values.[199] Indeed, the *Tokyo Round Antidumping Code* that existed prior to the AD Agreement contained little guidance with respect to the scope of either the "price" or the "product" to which Article VI of GATT 1947 referred. With Article 2.4.2 of the AD Agreement,

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[197] In arguing that there is an obligation to calculate the margin of dumping for the product as a whole in all actions in an antidumping proceeding, the EC emphasizes the use of the word "product" and "products" in Articles VI:1 and VI:2 of GATT 1994, and Article 2.1 of the AD Agreement. EC Appellant Submission, paras. 59, 61. In doing so, the EC invites the Appellate Body to interpret these words without due consideration to the context in which the words appear. Nevertheless, even the EC acknowledges that the context in which words are used is relevant. EC Appellant Submission, para. 153. Thus, it is necessary to take a more holistic approach, and examine the use of the term "product" in relation to the "price difference" to which Article VI refers.

[198] *US – Softwood Lumber Dumping (AB)*, para. 85.

[199] See, e.g., *US – Salmon*, para. 483 (margins of dumping established by comparing an average normal value to individual export transactions); *EC – Audiocassettes*, paras. 499-501.

the WTO Members adopted more specific guidelines regarding the establishment of the price to which normal value is compared during the investigation phase.

174. As discussed above, Article 2.4.2 requires that when a Member utilizes the average-to-average comparison method, the Member must consider "all comparable export transactions." Based on the specific text of Article 2.4.2, the Appellate Body has found that a Member utilizing the average-to-average comparison method must determine the margin of dumping for the product as a whole.[200] Thus, the "product" must be the product as a whole when the "price" involves the average of "all comparable export transactions."

175. In *US – Softwood Lumber Dumping (AB)*, the Appellate Body expressly recognized that the only issue before it was whether offsets were required under the average-to-average comparison method found in Article 2.4.2.[201] The Appellate Body emphasized that the terms "all comparable export transactions" and "margins of dumping" should be interpreted "in an integrated manner."[202] Accordingly, the Appellate Body's conclusion that there was an obligation to calculate the margin of dumping for the product as a whole when using the average-to-average comparison methodology during the investigation phase was the result of its interpretation of "all comparable export transactions" together with "margins of dumping." Thus, the Appellate Body's finding was grounded in the specific text of a provision – Article 2.4.2 of the AD Agreement – that applies only to the use of the average-to-average comparison method during the investigation phase.[203]

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[200] *US – Softwood Lumber Dumping (AB)*, paras. 96-99 ; *EC – Bed Linen (AB)*, para. 53

[201] *US – Softwood Lumber Dumping (AB)*, paras. 104, 105, 108.

[202] *US – Softwood Lumber Dumping (AB)*, para. 85.

[203] Contrary to the EC's assertions, the Panel did not "disregard" or "repudiat[e]" the Appellate Body's findings. EC Appellant Submission, para. 64. Rather, the Panel properly

176. The obligation to calculate the margin of dumping for the product as a whole reflects the use of *averages* of export prices and normal values. However, when a Member utilizes a comparison methodology other than the average-to-average methodology, the "price" to which normal value is compared is the price of an individual export transaction. Thus, during the investigation phase, Article 2.4.2 authorizes the use of transaction-to-transaction comparisons, or, in specified circumstances, comparisons of individual export transactions to weighted-average normal values. In either case, the "price" is the price of an individual export transaction. In these circumstances, the "product" being introduced into the commerce of the importing Member is the product involved in the particular export transaction.[204] Moreover, Article 2.4.2 does not require that the results of those multiple comparisons be aggregated to represent what the EC would consider the "product as a whole" or to be expressed as a percentage.

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found that the Appellate Body's findings in *EC – Bed Linen (AB)* and *US – Softwood Lumber Dumping (AB)* were limited to the use of the average-to-average comparison method during the investigation phase. Panel Report, para. 7.273. As the United States did not use the average-to-average comparison method in any of the assessment proceedings subject to this dispute, the Panel's finding is consistent with both *EC – Bed Linen (AB)* and *US – Softwood Lumber Dumping (AB)*.

[204] While the EC relies on Article 2.1 to support its argument that there is an obligation to calculate a margin of dumping for the product as a whole in all circumstances, the text of Article 2.1 supports the conclusion that the margin of dumping can be established on a transaction-specific basis. As one member of the Panel noted with respect to the definition of dumping in Article 2.1:

> Because it clearly connotes real world business transactions, the phrase "a product . . . introduced into the commerce of another country" can reasonably be interpreted to permit an authority to focus on particular import transactions and does not require a consideration of dumping in terms of an aggregate or average of export transactions over a period of time.

Panel Report, para. 7.285. Thus, because Article 2.1 permits an authority to consider an individual transaction in determining whether a product is dumped, Article 2.1 does not create an obligation to calculate the margin of dumping for the product as a whole.

177. The fact that the "margin of dumping" need not always refer to a calculation for the "product as a whole," as the EC argues, is confirmed by the text of the first paragraph of Ad Article VI:1 of the GATT 1994. That provision uses the term "margin of dumping" in a manner that can be reasonably interpreted only as applying on a transaction-specific basis. Specifically, Ad Article VI:1 provides as follows:

> Hidden dumping by associated houses (that is, the sale by an importer at a price below that corresponding to the price invoiced by the exporter with whom the importer is associated, and also below the price in the exporting country) constitutes a form of price dumping with respect to which the margin of dumping may be calculated on the basis of the price at which the goods are resold by the importer.

This provision expressly refers to a particular type of export transaction – a sale through an associated importer – for which the margin of dumping may be calculated based on the price charged by the importer. Because an exporter may sell through different channels (*e.g.*, some sales may be made directly to the ultimate purchase, while others may be made through "associated houses"), Ad Article VI:1 clearly recognizes that the term "margin of dumping" may apply on a transaction-specific basis.

178. The United States does not use an average-to-average comparison methodology in assessment proceedings. Therefore, any obligation stemming from Article 2.4.2 regarding the use of average-to-average comparisons during the investigation phase is not applicable to U.S. assessment proceedings. Because Article 2.4.2 is not relevant to the U.S. assessment proceedings, its terms are not relevant to the interpretation of Article VI for purposes of those assessment proceedings. In the absence of any relevance of Article 2.4.2, Article VI may not be interpreted to prohibit transaction-specific comparisons in assessment proceedings, nor may

Article VI be interpreted so as to impose any obligation on the United States to provide offsets in assessment proceedings.

2. Assessment Proceedings May Be Import-Oriented

179. Another variable determining the margin of dumping is the universe of transactions that must be included in the price to be compared to normal value. Article 6.10 provides that authorities shall determine a margin of dumping for each exporter or producer of the product under investigation. Thus, in an investigation, an individual margin of dumping must be calculated on an exporter- or producer-specific basis. However, this does not mean that the term "margin of dumping" must be interpreted on an exporter- or producer-specific basis any time it appears in the AD Agreement.[205] Consistent with the customary rules of treaty interpretation, context is important in determining the precise meaning of any term within the AD Agreement.

180. In this regard, the context of Article 9 demonstrates that the margin of dumping determined during an assessment proceeding may be calculated on an importer- or import-specific basis. As discussed above, while Article 5 focuses on the pricing behavior of an exporter or producer for purposes of determining whether injurious dumping exists so as to justify the imposition of an antidumping duty, Article 9.3 deals with the liability of importers for the payment of antidumping duties on specific import transactions.[206] Thus, as the Panel

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[205] Article 6.10 has only limited procedural application. For example, the Appellate Body has recognized that "the reference in Article 11.4 to 'the provisions of Article 6 regarding evidence and procedure' does not import into Article 11.3 an obligation for investigating authorities to calculate dumping margins (on a company-specific basis or otherwise)." *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 155. In that dispute, the Appellate Body found that the reference to evidence and procedure in Article 6 does not obligate an authority to calculate a dumping margin in a sunset review.

[206] Panel Report, para. 7.201.

recognized: "Considerations that are relevant to determining the design of an appropriate comparison methodology in the context of investigations to determine whether dumping exists may not apply with equal force to the design of a methodology for determining the final liability for payment of anti-dumping duties."[207]

181. Article 9.4 indicates that Members may adopt prospective normal value or variable duty systems. Under such systems, an authority establishes prospective normal values that serve as reference prices. Each subsequent import is then compared to the appropriate normal value to determine the amount of antidumping duty, if any.[208] In comparing the price of the import to the prospective normal value, an authority is determining the margin of dumping for that transaction. If the price of a particular import transaction happens to exceed the normal value, no antidumping duty is assessed. However, nothing in Article 9.4 suggests that in such a situation a Member is obligated to provide the importer with a credit that can be used against antidumping duty liability on other import transactions.

182. The EC contends that the assessment of an antidumping duty under a prospective normal value system is not a final assessment based on the actual margin of dumping.[209] Rather, according to the EC, the collection of an antidumping duty on individual export transactions under a *prospective* normal value system is only an "intermediate stage" in the collection process that could be subject to a final duty assessment under Article 9.3.1, and a refund proceeding

[207] Panel Report, para. 7.201.
[208] Panel Report, para. 7.206.
[209] EC Appellant Submission, para. 292.

under 9.3.2.[210] The EC never explains the relevance of Article 9.3.1 to its argument. In fact, Article 9.3.1 is inapposite because it expressly concerns *retrospective* duty assessment systems.

183. Moreover, as stated above, a Member utilizing a prospective normal value system calculates the margin of dumping for each import by comparing its price to the established prospective normal value.[211] The availability of a refund proceeding pursuant to Article 9.3.2 does not negate the ability of a Member to determine the margin of dumping for each individual export transaction. Article 9.3.2 provides as follows:

> A refund of any such duty paid in excess of the *actual* margin of dumping shall normally take place within 12 months, and in no case more than 18 months, after the date on which a request for a refund, duly supported by evidence, has been made by an importer of the product subject to the anti-dumping duty. (Emphasis added).

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[210] EC Appellant Submission, para. 292.

[211] One might argue that because the Appellate Body in *EC – Bed Linen (Article 21.5) (AB)*, para. 124, indicated that the rules on the imposition of duties have no bearing on the rules on the determination of margins of dumping, a Member utilizing a prospective normal value system is not determining a margin of dumping at the time the duty is assessed. Such an argument, however, depends upon a misinterpretation of that report. In *EC – Bed Linen (Article 21.5)*, the Appellate Body was responding to an argument in which the EC sought to justify a particular investigation methodology by referencing language that is specifically applicable only after an antidumping duty is imposed. The Appellate Body rejected that argument, noting, *inter alia*, at paragraph 123, that "the imposition and collection of anti-dumping duties under Article 9 is a separate and distinct phase of an anti-dumping action that necessarily occurs *after* the determination of dumping, injury, and causation under Articles 2 and 3 has been made." (Emphasis in original). Similarly, in footnote 155 of the report, the Appellate Body quoted language from its original report in *EC – Bed Linen* in which it noted the distinction between Article 2.4.2, which is concerned with "the existence of margins of dumping" in an investigation, and Article 9, which relates to the subsequent collection and assessment of antidumping duties. The AD Agreement rules for determining the margin of dumping in an investigation do not uniformly apply to assessment proceedings pursuant to Article 9.3. That recognition is entirely consistent with the U.S. position that whatever Article 2.4.2 requires with respect to offsets in an investigation, there is no textual basis for imputing such requirements to an Article 9.3 assessment proceeding.

184. Thus, Article 9.3.2 provides for a refund of duties paid in excess of the "actual" margin of dumping in a prospective assessment system.[212] Article 9.3.2, however, provides no guidance as to how a Member should determine the "actual" margin of dumping in a refund proceeding.[213]

185. In a prospective normal value system, the prospective normal value is established at some time prior to the time of the export transaction under consideration. When a refund proceeding has been requested, a Member may update the reference price it uses as the prospective normal value, and compare that price to the export transaction to determine the "actual" margin of dumping for that transaction. To the extent that this "actual" margin of dumping is less than the amount paid at the time of the original assessment, the Member would be obligated to provide a refund.

186. Alternatively, a Member may simply use the Article 9.3.2 process to correct any errors that may have resulted in a collection of antidumping duties at the time of import in excess of the "actual" margin of dumping.

187. In either case, nothing in Article 9.3.2 indicates that during a refund proceeding under Article 9.3.2, the Member must determine a margin of dumping based on all of the exporter's transactions, including those to separate importers. Indeed, as the Panel correctly found, there is no textual support for the proposition that in a refund proceeding a Member must determine the

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[212] In prospective systems, the customs authority assesses the antidumping duty at the time that the goods enter the country.

[213] One might argue that the assessment of the antidumping duty in a prospective normal value system does not involve the determination of a margin of dumping, but is rather a mechanical comparison of an export price and a reference price with no price adjustments provided. There is, however, no support for the assertion that prospective normal value systems need not undertake to make a "fair comparison," taking into account differences that may affect price comparability between the prospective normal value and the export price under consideration.

entitlement to a refund by calculating an overall margin of dumping based upon all export transactions by a specific exporter or producer to all importers.[214]

188. Returning to the example provided in Table 1, it is apparent that the EC's approach is illogical when applied to assessment proceedings:

Table 1

Exporter A		10.0 % prior estimated cash deposit rate (a)						
	Entered Value (b)	Cash Deposits (c=b*a)	Export Prices (d)	Normal Values (e)	Dumping Margins (e-d)	Assess Rate (e)	Duty Assessed (f=c*e)	Result (f-c)
Importer 1 Model X	$ 19	$ 1.90	$ 19	$ 25	$ 6		$ 4.75	pay $2.85
Model X	$ 20	$ 2.00	$ 20	$ 25	$ 5		$ 5.00	pay $3.00
Model X	$ 21	$ 2.10	$ 21	$ 25	$ 4		$ 5.25	pay $3.15
Importer 1 Total	$ 60 (g)				$15 (h)	25 % (e=h/g)	$15	
Importer 2 Model Y	$ 26	$ 2.60	$ 26	$ 25	$ 0 (-1)		$ 0	$2.60 refund
Model Y	$ 27	$ 2.70	$ 27	$ 25	$ 0 (-2)		$ 0	$2.70 refund
Importer 2 Total	$ 40	$ 4			$ 0 (-3)	0 %	$ 0	
Exporter A Total	$ 100	13.39 % new est. cash deposit (i/d)	$ 112		$ 15 (i)			

[214] Panel Report, para. 7.206.

189. If assessment rates were calculated at the exporter-specific level, all importers of merchandise from each exporter would be assessed antidumping duties at the same rate. Thus, merely because a product was purchased from the same exporter, one importer purchasing products at non-dumped prices would be liable for antidumping duties at the same rate as another importer that purchased products at dumped prices. In the example in Table 1, purchases of Importer 2 cannot offset the purchases of Importer 1 unless the assessment rate is calculated at the exporter-specific level. Such a calculation would offset the $15 amount of dumping attributable to Importer 1's purchases with the amount by which Importer 2's purchasers were above normal value (*i.e.*, by $3). The resulting assessment rate would be 12 percent (*i.e.*, $12 dumping margin divided by the $100 entered value for all of Exporter A sales.) Accordingly, both importers would be assessed antidumping duties at a 12 percent *ad valorem* rate, even though Importer 2 paid more than normal value for each of its imports.[215]

190. The U.S. assessment system works in a manner similar to a prospective normal value system. Commerce will first compare individual export transactions to monthly weighted average normal values. Where normal value is greater than the export or constructed export price for that transaction, Commerce finds that there is a margin of dumping for that transaction.

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[215] This example also demonstrates again that the second sentence of Article 2.4.2 would be nullified by requiring that non-dumped transactions offset dumped transactions outside the context of the average-to-average comparison method. In the average-to-transaction method used in the example, providing for offsets results in a total dumping margin of $12. An average-to-average methodology, using offsets, necessarily and mathematically gives the same result. The average export price for Model X's three transactions is $20 compared to an average normal value of $25, resulting in an margin of $15 with respect to Model X. The average export price for Model Y's two transactions is $26.5 compared to an average normal value of $25, resulting in a dumping offset of $3. Offsetting the Model X margin by the Model Y margin results in a total dumping margin of $12, which is identical to the result reached using the average-to-transaction method.

If export or constructed export price is greater than normal value, then that transaction is not dumped, and there is no margin of dumping.[216] Commerce adds together all of the margins of dumping for the dumped transactions on an importer-specific basis, and divides that by the total entered value of all transactions for the importer. Commerce uses this percentage to instruct the customs officials how to assess antidumping duties. Customs applies this percentage to all transactions of that importer. By doing so, the United States collects the same amount that would be due if the amount by which each transaction were dumped were determined and assessed separately.

F. The AD Agreement Does Not Recognize "Negative" Margins of Dumping

191. Further support for the U.S. position is found in the fact that the AD Agreement does not recognize the concept of "negative dumping margins." In the AD Agreement, the word "margin" is modified by the word "dumping," giving it a special meaning. The definition of the "margin of dumping" is found in Article VI of the GATT 1994. It is the price difference when a product has been "introduced into the commerce of an importing country at *less than* its normal value."[217] Thus, by the express terms of Article VI, the margin of dumping is the amount by

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[216] The EC argues that when the Members sought to allow the investigating authorities to disregard certain matters, they did so explicitly, citing to Articles 2.2.1, 2.7, and 9.4, and Annex II of the AD Agreement. *See* EC Appellant Submission, paras. 67, 144. The premise of the EC's argument is that Members must calculate the margin of dumping for the product as a whole, and thus must consider in that determination export transactions that are not dumped. EC Appellant Submission, para. 66.

In assessing antidumping duties, however, the United States is not disregarding anything. Rather, it is determining whether a specific export transaction has been sold at a price that is less than normal value. If so, then that transaction has been dumped, creating antidumping duty liability for the amount by which that transaction is less than normal value. If the price is greater than normal value, then the transaction is not dumped, creating no liability for the amount by which that transaction is less than normal value.

[217] GATT 1994 Article VI:2 (emphasis added).

which normal value *exceeds* export price, or alternatively the amount by which export price *falls short* of normal value. If the price of an export transaction exceeds normal value, there is no margin of dumping.

192. This is confirmed by the text of Article 9.4 of the AD Agreement. Article 9.4 addresses the antidumping duties to be applied to imports from an exporter or producer for whom an authority did not calculate an individual margin of dumping pursuant to Article 6.10. Article 9.4 provides that, in making this determination, authorities shall disregard any "zero and *de minimis*" margins. That is, either export price is less than normal value, and a margin of dumping exists, or export price exceeds normal value, in which case there is no, or a "zero," margin of dumping. The use of the phrase "zero and *de minimis*" confirms that the AD Agreement does not recognize so-called "negative" margins of dumping. Otherwise, the drafters would have referred to "negative margins of dumping" in Article 9.4. There is, therefore, no requirement that the results of a comparison of the export price of one transaction to normal value have any effect on a separate comparison involving a separate transaction when assessing antidumping duties.

G. Application of the Special Standard of Review in Article 17.6(ii) of the AD Agreement Confirms the Permissibility of the U.S. Approach

193. The interpretive issue before the Appellate Body in this appeal is whether or not the provisions of Article VI of the GATT 1994 and the AD Agreement express an obligation agreed to by the Members to consider non-dumped sales as an offset to the dumping that occurs subsequent to the imposition of an antidumping duty.[218] For the reasons set forth above, the

[218] Of course, where no obligation is provided in a treaty, no obligation exists. For example, it has been recognized that neither Article VI of the GATT 1994 nor the AD Agreement contain an obligation with respect to how an authority may or may not define the "product under consideration." *US – Softwood Lumber Dumping (AB),* para. 7.152; *Korea –*

United States believes that the correct interpretation of the AD Agreement is that offsets are not required in assessment proceedings.

194. That notwithstanding, it must be recalled that with respect to an authority's interpretation of provisions in the AD Agreement, Article 17.6(ii) sets out the following special standard of review:

> [T]he panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

195. The question under Article 17.6(ii) is whether an authority's interpretation of the AD Agreement is a permissible interpretation. Article 17.6(ii) acknowledges that there are provisions of the Agreement that "admit[] of more than one permissible interpretation." When that is the case, and when an authority has relied upon one such interpretation, the authority's measure shall be found in conformity with the AD Agreement.[219]

196. The negotiators of the AD Agreement saw fit to make specific provision for those instances in which a provision of the AD Agreement would be susceptible of more than one permissible reading.[220] That very fact provides context for the interpretation of the AD Agreement. It reflects the negotiators' affirmative indication that they had left issues

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Paper, paras. 7.219-7.224.

[219] *See Argentina – Poultry*, para. 7.341 and note 223 ("We recall that, in accordance with Article 17.6(ii) of the AD Agreement, if an interpretation is 'permissible', then we are compelled to accept it.").

[220] As the Ministerial Decision on Anti-Circumvention clearly demonstrates, such gaps or ambiguities are not incongruous within the context of a negotiated agreement in which the Members were able to agree on certain obligations and were not able to agree on, or simply did not provide for, others.

unresolved, and that they did not intend for those issue to be resolved through the dispute settlement process.[221] Indeed, with regard to issues where no agreement was reached, multiple permissible interpretations of a provision constitute the essence of the agreement that was reached.

197. The negotiators also recognized that they could not possibly foresee every interpretive question that might arise out of highly technical and complex antidumping proceedings. They understood that, with regard to many of these complex issues, the established practices of national authorities at the time of the AD Agreement's conclusion differed, and that the AD Agreement should allow sufficient flexibility for authorities to continue their different practices within the parameters established by the Agreement. This fact is evident in the text of the AD Agreement itself. With respect to investigations, substantive obligations regarding the calculation of antidumping margins are expressed in some detail. In contrast, with regard to the various post-investigation proceedings, the obligations are generally procedural and expressly accommodate a variety of systems by which Members actually assess and collect antidumping duties.

198. Thus, in applying Article 17.6(ii) to the present case, the Appellate Body should recall that there may be multiple permissible interpretations of particular provisions in the AD Agreement and that, at a minimum, the U.S. approach to assessment proceedings is a permissible

[221] Thus, for example, one recent panel report involved a situation in which Argentina's investigating authority interpreted the term "a major proportion" in Article 4.1 of the AD Agreement (concerning the definition of "domestic industry") as a proportion that may be less than 50 percent. The panel upheld that interpretation as permissible, even while acknowledging that it may not be the only permissible interpretation. *Argentina – Poultry*, para. 7.341.

one. Accordingly, the Appellate Body should reject the EC's claims and affirm the Panel's finding that offsets are not required in assessment proceedings.

V. The Panel Properly Rejected the EC's "As Such" Claims [222]

199. With respect to the EC's "as such" claims concerning a U.S. "zeroing methodology" in assessment proceedings, the "Manual"[223] and "Section 351.414(c)(2) of the Regulations," the Panel found that the EC's claims under Articles 2.4, 2.4.2, 5.8, 9.3, 11.1, 11.2, 11.3, 1 and 18.4 of the AD Agreement, Articles VI:1 and VI:2 of the GATT 1994 and Article XVI:4 of the WTO Agreement "are dependent upon" a finding of an inconsistency with Articles 2.4 and/or 2.4.2.[224] The Panel also found that the EC's claim of a breach of Articles 2.4 and/or 2.4.2 "is based upon an interpretation of these provisions as prohibiting zeroing and the use of asymmetrical comparison of export price and normal value" in assessment proceedings, new shipper reviews,

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[222] EC Appellant Submission, paras. 340-348 and 381(e)-(h).

[223] Before the Panel, the EC sometimes appeared to identify the "Manual" as part of its "as such" claim with respect to the measure it identified as the "Standard Zeroing Procedures." Panel Report, para. 7.73. On appeal, the EC has requested that, with respect to its "as such" claims regarding the "Manual," the Appellate Body reverse the findings in paragraphs 7.289-7.294 of the Panel Report. In those paragraphs, the Panel addresses the EC's claims regarding the "Standard Zeroing Procedures" in relation to assessment proceedings, new shipper reviews, changed circumstances reviews, and sunset reviews, although the "Manual" is not explicitly mentioned. However, the EC does not cite or address paragraphs 7.289-7.294 in its argument. *Compare* EC Appellant Submission, para. 381(f) (citing Panel Report, paras. 7.107 and 7.289-7.294) *with* paras. 342-343 and footnote 341 (citing only Panel Report, para. 7.107). Given the lack of clarity concerning the EC's appeal regarding its "as such" claims concerning the "Manual," the United States addresses those claims in this section of its Appellee Submission, as well as in Section VI.A below, which deals with the EC's claims regarding the Panel's exercise of judicial economy.

[224] *See* Panel Report, para. 7.290 (in relation to assessment proceedings) and para. 7.293 (in relation to new shipper reviews, changed circumstances reviews, and sunset reviews). With the exception of its "as such" claim regarding the "Manual" in relation to investigations, all of the EC's "as such" claims pertain to assessment proceedings and reviews that take place following the imposition of an antidumping duty.

changed circumstances reviews, and sunset reviews.[225] As the Panel properly rejected that interpretation,[226] it properly rejected the EC's "dependent" claims of "as such" inconsistency.[227] With respect to investigations, the Panel determined that it would not make findings on the EC's "dependent claims," including its claim under Article 5.8, after having found that the "zeroing methodology" is inconsistent "as such" with Article 2.4.2 of the AD Agreement.[228] The Panel also found that "it is not necessary" to make a finding on whether the "Manual" is WTO inconsistent "as such."[229]

200. The EC does not take issue with the Panel's characterization of these claims as "dependent" upon a finding of a breach of Articles 2.4 and/or 2.4.2. Indeed, the EC itself describes these claims as "consequential."[230] As demonstrated in Section IV, above, the Panel properly found that Articles 2.4 and/or 2.4.2 neither require offsets nor prohibit the use of an average-to-transaction comparison method once an antidumping duty has been imposed. As demonstrated in Section VI.A, below, the Panel also properly declined to rule on the WTO consistency of the "Manual." For these reasons, the Appellate Body should reject the EC's claims that the U.S. "zeroing methodology," the "Manual" and "Section 351.414(c)(2) of the

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[225] Panel Report, para. 7.290 (in relation to assessment proceedings) and para. 7.293 (in relation to new shipper reviews, changed circumstances reviews, and sunset reviews). The Panel did not make this finding with respect to the "Manual" in relation to investigations.

[226] Panel Report, section VII.E.

[227] Panel Report, para. 7.291 (in relation to assessment proceedings), para. 7.294 (in relation to new shipper reviews, changed circumstances reviews, and sunset reviews), and paras. 7.107-7.109 (in relation to investigations and the Panel's findings regarding the "Manual").

[228] Panel Report, para. 7.109.

[229] Panel Report, para. 7.107.

[230] EC Appellant Submission, para. 340 ("zeroing methodology"), para. 344 ("Section 351.414(c)(2) of the Regulations"), and para. 348 (in relation to new shipper reviews, changed circumstances reviews, and sunset reviews).

Regulations" are inconsistent "as such" with Articles 2.4, 2.4.2, 5.8[231], 9.3, 11.1, 11.2, 11.3, 1 and 18.4 of the AD Agreement, Articles VI:1 and VI:2 of the GATT 1994 and Article XVI:4 of the WTO Agreement.[232]

201. Even if the Appellate Body were to reverse the Panel's findings concerning Articles 2.4 and 2.4.2 with respect to the assessment proceedings at issue,[233] the Appellate Body should decline to complete the legal analysis and examine the EC's "as such" claims. Article 17.6 of the DSU limits appeals to "issues of law covered in the panel report and legal interpretations developed by the panel." Based on the limitations imposed by Article 17.6, the Appellate Body has previously "declined to complete the legal analysis of a panel in circumstances where that would involved addressing claims 'which the panel has not examined at all.'"[234] In this case, the

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[231] The EC's "as such" claim with respect to Article 5.8 concerns the "Manual" as it relates to investigations.

[232] EC Appellant Submission, paras. 340-348 and 381(e)-(h). In paragraph 340 of its Appellant Submission, the EC appears to ask for reversal of a finding not made by the Panel. The EC ostensibly appeals the Panel's consequential finding "to the effect that the U.S. Standard Zeroing Methodology used in 'administrative review' proceedings *are not measures* ... ." EC Appellant Submission, para. 340 (emphasis added). However, the paragraphs of the Panel Report cited by the EC do not include a finding by the Panel that the "zeroing methodology" used in assessment proceedings "are not measures." Even if the Panel had made such a finding, the EC's claim should be dismissed. The EC's Notice of Appeal did not provide adequate notice of the alleged error because it makes no reference to such a finding. *See Working Procedures for Appellate Review*, WT/AB/WP/5 (4 January 2005), Rule 20(2)(d) (requiring that a Notice of Appeal identify the alleged errors in the issues of law and legal interpretations developed by the panel, as well as an indicative list of the paragraphs of the panel report containing the alleged errors). Finally, to the extent the EC is relying on the Panel's "as such" finding with respect to "zeroing methodology" in antidumping investigations, that finding is in error as demonstrated in the Other Appellant Submission of the United States of America, February 1, 2006 ("U.S. Other Appellant Submission"). For these reasons, the Appellate Body should decline to rule on this aspect of the EC's claim.

[233] *See* Exhibits EC-16 to EC-31, and Panel Report, footnote 202.

[234] *EC - Sugar Subsidies (AB)*, para. 337 (citations omitted), and paras. 338-341.

Panel did not examine the EC's "as such" claims in relation to assessment proceedings, new shipper reviews, changed circumstances reviews, and sunset reviews "at all."

202. Moreover, a completion of the legal analysis is particularly inappropriate where a party has failed to establish its *prima facie* case in the course of its submissions to the panel.[235] The Appellate Body is faced with this situation in the instant case.

203. In particular, the EC failed to articulate the basis for the claimed inconsistency of new shipper reviews, changed circumstances reviews, and sunset reviews with particular WTO provisions and obligations.[236] In addition, given the EC's failure to demonstrate that "Section 351.414(c)(2) of the Regulations" mandates asymmetry or precludes symmetry, the EC's evidence and arguments were insufficient to explain the claimed inconsistency of the regulation with particular WTO provisions and obligations.[237] Nor did the EC demonstrate that the "Manual" requires Commerce to ignore "negative dumping margins" or precludes Commerce from offsetting "negative margins".[238] The EC also never explained how the various portions of the "Manual" are WTO inconsistent.[239] Although on appeal the EC now asserts that the "Manual" "directs" the use of the "Standard Zeroing Procedures," it fails to substantiate that assertion, and the United States contests that assertion.[240] In sum, the evidence and arguments in

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[235] *US – Gambling (AB)*, para. 141 (stating that evidence and arguments underlying a *prima facie* case "must be sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision").

[236] U.S. First Submission, paras. 106-107.

[237] U.S. First Submission, paras. 102-105; U.S. Second Submission, para. 46.

[238] U.S. First Submission, paras. 84-89; U.S. Second Submission, paras. 50-59.

[239] U.S. Second Submission, paras. 50-59.

[240] EC Appellant Submission, para. 343.

the EC's submissions to the Panel are insufficient to explain the bases for the claimed inconsistency of the measures with the EC's lengthy list of provisions.

204. Given the EC's failure before the Panel to make a *prima facie* case in relation to its "as such" claims, and the absence of a full exploration of the issues associated with these claims by the Panel, including the absence of any sort of analysis that would satisfy the standard articulated by the Appellate Body for an "as such" finding,[241] the Appellate Body should decline to complete the legal analysis.

VI. The Panel Properly Exercised Judicial Economy

205. Turning to the EC's claims regarding the Panel's exercise of judicial economy, the Appellate Body first addressed judicial economy in its report on *US – Wool Shirts*. In that report, the Appellate Body approved the practice of WTO and GATT 1947 panels of "address[ing] only those issues that such panels considered necessary for the resolution of the matter between the parties, and . . . declin[ing] to decide other issues."[242] The Appellate Body considered that this practice was in accord with the aims of the dispute settlement system, and in that context noted the provisions of Articles 3.4 and 3.7 of the DSU. The Appellate Body concluded: "A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute."[243]

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[241] *See* U.S. Other Appellant Submission, paras. 50-52 (discussing the standard articulated by the Appellate Body with respect to an "as such" claim).

[242] *US – Wool Shirts (AB)*, part VI (footnote 27 omitted).

[243] *US – Wool Shirts (AB)*, part VI (footnote 30 omitted).

206. The Appellate Body has upheld panels' exercise of judicial economy in a number of subsequent disputes.[244] As discussed below, the Appellate Body should do so as well in the instant case.

A. The "Manual"

207. The Panel concluded that "it is not necessary" to make a finding on whether the "Manual" is WTO inconsistent as such.[245] On appeal, the EC argues that the Panel should have made such a finding because, allegedly, the "'Manual' *directs* the use of the "Standard Zeroing Procedures, Methodology, and Practice."[246] However, the EC fails to substantiate its assertion that the "Manual" "directs" anything. Moreover, before the Panel, the EC never explained how the various portions of the "Manual" are WTO inconsistent.[247] Finally, the EC has failed to explain why a finding regarding the "Manual" is necessary to resolve the dispute between the parties. Thus, the Panel properly found that "the Manual has been referred to by the European Communities principally as evidence to confirm the 'standard' character of the 'Standard Zeroing Procedures'."[248] Therefore, the Appellate Body should decline to make the finding requested by the EC.

B. "Assessment Instructions and Article 9.3"[249]

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[244] *See, e.g., Argentina – Footwear (AB)*, para. 98; *US – Wheat Gluten (AB)*, paras. 183-184; *US – Lamb Meat (AB)*, paras. 194-195; *Canada – Wheat Exports (AB)*, para. 133.

[245] Panel Report, para. 7.107.

[246] EC Appellant Submission, para. 343 (emphasis added).

[247] US Second Submission, paras. 50-59.

[248] Panel Report, para. 7.107.

[249] EC Appellant Submission, paras. 349-358.

208. Having found that the United States acted in breach of Article 2.4.2 of the AD Agreement with respect to the antidumping investigations at issue,[250] the Panel exercised judicial economy with regard to the EC's claim against those determinations under, *inter alia*, Article 9.3 of the AD Agreement.[251] As the Panel explained, "[d]eciding such dependent claims would provide no additional guidance as to the steps to be undertaken by the United States in order to implement our recommendation regarding the violation on which it is dependent."[252]

209. During the interim review, the EC argued that not all of its "as applied" claims relating to investigations under provisions other than Articles 2.4.2 and 2.4 of the AD Agreement are consequential.[253] In particular, the EC requested the Panel to find that an alleged "automatic assessment" of liability in its sample case was inconsistent with Article 9.3 of the AD Agreement.[254] The issue raised by the EC regarding "automatic assessment" concerns situations in which, as a result of the absence of a request for administrative review, Commerce assesses the amount of antidumping duty at the rate in effect at the time of importation of the subject merchandise.[255] The Panel declined the EC's request, stating as follows:

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[250] Panel Report, para. 7.32.
[251] Panel Report, para. 7.34.
[252] Panel Report, para. 7.34.
[253] Panel Report, para. 6.4.
[254] Panel Report, para. 6.4.
[255] As the Panel correctly explained, "automatic assessment" occurs as a result of the absence of a request for administrative review. Panel Report, para. 6.5. The Panel also explained that "automatic assessment" results in the assessment of an antidumping duty "in an amount corresponding to the margin of dumping determined in the original investigation." Panel Report, para. 6.5. In this case, and in the context of the EC's claims with respect to investigation determinations, the Panel's explanation is correct. However, "automatic assessment" is more properly characterized as the final assessment of an antidumping duty in an amount corresponding to the rate in effect at the time of importation of the subject merchandise.

> As explained in paragraph 7.12 of the Report, we have treated this claim as a dependent claim on the grounds that it alleges a breach of a provision as a consequence of the alleged violations of Articles 2.4 and 2.4.2 of the AD Agreement. This characterization is based on the express language used by the European Communities in paragraph 94 of its First Submission, where it states that the United States acted inconsistently with Article 9.3 'as a consequence of the unlawful zeroing method described in this submission'. It is clear from paragraph 95-96 that the key argument in support of this claim is that as a result of the use of an 'inflated' margin of dumping as the basis of the assessment of the amount of anti-dumping duty, the amount of anti-dumping duty exceeded the margin of dumping as established under Article 2. There is no argumentation that Article 9.3 is violated other than as a result of a violation of other provisions of the AD Agreement. Against this background, we see nothing in the request by the European Communities for interim review that substantiates the assertion that its 'as applied' claim under Article 9.3 is not consequential.[256]

210. The EC asserts that the Panel's rejection of the EC's request constitutes a false exercise of judicial economy.[257] According to the EC, a finding on Article 9.3 with respect to "automatic assessment" was necessary "in order to effectively resolve the dispute between the parties."[258] In particular, the EC alleges that "in the context of implementation, this aspect of the dispute will not have been resolved," because when the EC requests the United States to bring the measure at issue into conformity with Article 2.4.2, "[t]he United States will respond that the measure at issue is already in conformity with Article 9.3."[259]

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[256] Panel Report, para. 6.5.

[257] EC Appellant Submission, para. 357. In this regard, the EC asserts that the United States did not contest the EC's claim that the measures at issue are inconsistent with Article 9.3 of the AD Agreement. EC Appellant Submission, para. 353. This assertion is incorrect. *See, e.g.*, U.S. First Submission, paras. 49-54 (responding to the EC's arguments concerning Article 9); and Comments of the United States on the EC Request for Review of Precise Aspects of the Interim Report, September 12, 2005, paras. 5-6 (contesting the EC's assertion that the United States did not address the EC's claims under Article 9).

[258] EC Appellant Submission, para. 356.

[259] EC Appellant Submission, para. 355.

211. This argument simply invites speculation as to how the United States might implement the recommendations and rulings of the Dispute Settlement Body ("DSB"). As the Appellate Body stated in *US – FSC*, "we do not consider that it is appropriate for us to speculate on the ways in which the United States might choose to implement" the recommendations and rulings of the DSB.[260] The EC has not explained, let alone demonstrated, why a finding on this point is necessary to resolve the dispute. Moreover, there is no "glaring internal inconsistency," as alleged by the EC, between the Panel's findings with respect to the final investigation determinations at issue and the application of "zeroing" and the Panel's findings with respect to the administrative reviews at issue and the application of "zeroing."[261] The EC never identified and made claims regarding "automatic assessment" instructions as measures separate and apart from the investigation final determinations at issue. The Panel treated such instructions as "aspects of the measures [*i.e.*, the investigation final determinations at issue] on the basis of the EC's own submissions.[262] Accordingly, the Appellate Body should find that the Panel properly exercised judicial economy with respect to the issue of "automatic assessment" instructions and Article 9.3 of the AD Agreement.

C. "Article 2.4 and Original Proceedings"[263]

212. Having found that the United States acted in breach of Article 2.4.2 of the AD Agreement in the antidumping investigations at issue (by not providing an offset for those comparisons for

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[260] *US - FSC (AB)*, para. 175.

[261] EC Appellant Submission, para. 354.

[262] Panel Report, para. 6.13. *See also* EC First Written Submission, para. 63 (the measures at issue "include ... assessment instructions") and footnote 97, citing Exhibit EC-1.7.1 as an example.

[263] EC Appellant Submission, paras. 359-363.

which the weighted average export price exceeded the weighted average normal value),[264] the Panel exercised judicial economy with regard to the EC's claim against those determinations under Article 2.4 of that Agreement.[265] In addition, in light of its finding that the U.S. "'zeroing methodology', as it relates to original investigations, is a norm which, as such, is inconsistent with Article 2.4.2 of the AD Agreement," the Panel exercised judicial economy with regard to the EC's claim against the "zeroing methodology" "as such" under Article 2.4 of that Agreement.[266]

213. On appeal, the EC argues that the Panel's failure to make findings on its "as applied" and "as such" claims with respect to Article 2.4 constitutes a false exercise of judicial economy.[267] The Appellate Body should reject the EC's claim. Assuming *arguendo* that the report is adopted unchanged, the United States would be subject to a DSB recommendation to bring its measures into conformity with its obligations. The obligation in this case would be to refrain from "zeroing" pursuant to the average-to-average comparison method in the investigation phase.

214. The EC insists, however, that further findings are necessary because the United States might implement by "switching" to a different comparison methodology that might "introduce[] some kind of adjustment" that, according to the EC, would be inconsistent with Article 2.4.[268] The EC appears to be arguing that the Appellate Body should opine on how any potentially changed measure could be inconsistent with the WTO. However, any such measure is outside the terms of reference of this dispute – it does not exist and by definition would differ from the

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[264] Panel Report, para. 7.32.
[265] Panel Report, para. 7.33.
[266] Panel Report, para. 7.108.
[267] EC Appellant Submission, para. 363.
[268] EC Appellant Submission, para. 361.

measure that is at issue. Neither a panel nor the Appellate Body is in a position to speculate as to what form compliance by a Member would take or to opine in the abstract on the consistency of such hypothetical measures. Moreover, the EC's "switching" argument implies that the United States might intentionally and knowingly act in a WTO-inconsistent manner. As the Appellate Body has cautioned, however, Members should not be presumed to act in bad faith.[269]

215. In *Canada - Wheat Exports*, the Appellate Body recognized that a panel may "refrain from making multiple findings that the same measure is inconsistent with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute."[270] The EC quoted this finding with approval when it argued before the Appellate Body in *EC - Sugar Subsidies*, that "judicial economy does not concern the manner in which a panel's decision to exercise its discretion affects eventual implementation, but rather whether the findings in question are sufficient to resolve a dispute *as to the consistency of a measure with the covered agreements*."[271] In this case, the Panel found that the challenged "zeroing methodology," as it relates to investigations, is both "as applied" and "as such" inconsistent with Article 2.4.2 of the AD Agreement. These findings are sufficient to resolve the dispute as to the consistency of the antidumping investigations and methodology at issue with the covered agreements. Any further findings by the Panel would have been redundant. The Appellate Body should find that the Panel was within its discretion in declining to examine the EC's additional "as applied" and "as such" claims with respect to Article 2.4.

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[269] *Chile - Alcohol (AB)*, para. 74.

[270] *Canada - Wheat Exports (AB)*, para. 133.

[271] *EC - Sugar Subsidies (AB)*, para. 326 (emphasis in original), quoting EC Appellee Submission, para. 15.

216. The EC also requests that the Appellate Body "complete the analysis" with respect to investigations and its "as applied" and "as such" claims under Article 2.4. The EC, however, has not bothered to brief these claims on appeal.[272] In the absence of legal argumentation in support of its request, the Appellate Body should decline to complete the analysis.[273]

D. Articles 11.1 and 11.2[274]

217. The Panel found that the United States did not act inconsistently with Articles 11.1 and 11.2 of the AD Agreement.[275] On appeal, the EC asserts that the Panel erred in finding that the EC's claims under Articles 11.1 and 11.2 presuppose that the EC's claims under Articles 2.4 and 2.4.2 in relation to administrative reviews succeed.[276] The EC has failed to support its claim under Articles 11.1 and 11.2.

218. The EC argues that the "re-investigation of the cash deposit rate, which is carried out in conjunction with the retrospective assessment proceeding, must also be consistent with the obligations set out in Articles 11.1 and 11.2." However, the EC fails to explain what it perceives as the obligations set forth in Articles 11.1 and 11.2.[277] Moreover, the EC's argument fails to explain how those obligations, whatever they may be, relate to Article 9.3 assessment proceedings. The EC's failure to articulate a basis for the claimed inconsistency of the

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[272] EC Appellant Submission, paras. 359-363.

[273] In any event, Article 2.4 does not address the provision of offsets in investigations for the same reasons that it does not address the provision of offsets in assessment proceedings. Thus, the analysis set forth in Section IV.D, above, addressing the EC's "as applied" claims under Article 2.4 in respect of assessment proceedings, is equally applicable to the EC's "as applied" and "as such" claims under Article 2.4 in respect of investigations.

[274] EC Appellant Submission, paras. 364-367.

[275] Panel Report, paras. 7.288 and 8.1(f).

[276] EC Appellant Submission, para. 364.

[277] EC Appellant Submission, para. 365.

administrative reviews at issue with Articles 11.1 and 11.2 was evident also at the panel stage of this proceeding. The Panel asked the EC to explain the basis for its claim under Article 11, but the EC never provided the requested explanation.[278]

219. In addition, the EC never reconciled its Article 11 claims with its own recognition that "United States 'periodic reviews' of the amount of duty correspond to and fit within Article 9.3 of the Anti-Dumping Agreement."[279] Article 11.2 of the AD Agreement allows interested parties to request a review to determine "whether the injury would be likely to continue or recur if the duty were removed or varied." As discussed above, an Article 11.2 review is focused on determining whether injury would continue or recur *if* the duty were varied, rather than on a determination of a varying duty rate. The EC also has failed to reconcile its Article 11 claims with footnote 21 of the AD Agreement, which provides that "[a] determination of final liability for payment of anti-dumping duties, as provided for in paragraph 3 of Article 9, does not by itself constitute a review within the meaning of [Article 11]."

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[278] Panel Question 69 states, "Could the EC please explain the basis for its claim under Article 11, given that paragraph 183 [of the EC First Submission] states that the period reviews conducted by the US are covered by Article 9 of the ADA?" The EC responded as follows:

> The position of the European Communities is that the conduct of retrospective assessments in the United States must be consistent with both the provisions of Articles 2.4, 2.4.2 and 9.3, and with the provisions of Article 11 of the Anti-Dumping Agreement. However, its claims under Article 11 are conditional, in the sense that they may be considered withdrawn if the claims of the European Communities under Articles 2.4, 2.4.2 and 9.3 are successful.

See EC Answers to Panel's First Set of Questions, 18 March 2005, para. 193; *see also* U.S. Second Submission, para. 36 (pointing out that the EC's response to Panel Question 69 was non-responsive).

[279] *See* U.S. Second Submission, para. 36, quoting EC First Submission, para. 183.

220. In sum, the EC has given the Appellate Body no reason to believe that its claims under Article 11.1 and 11.2 of the AD Agreement can or must be addressed in order to resolve this dispute.

E. "Other Claims"[280]

221. The EC's category of "other claims" encompasses two distinct findings by the Panel. First, the Panel found that the United States "did not act inconsistently" with Articles 9.3, 11.1 and 11.2, 1 and 18.4 of the AD Agreement, Articles VI:1 and VI:2 of GATT 1994 and Article XVI:4 of the WTO Agreement in the assessment reviews at issue.[281] Second, having found that the United States acted in breach of Article 2.4.2 of the AD Agreement in the antidumping investigations at issue,[282] the Panel exercised judicial economy with regard to the EC's claims against those determinations under Articles 1, 2.4, 3.1, 3.2, 3.5, 5.8, 9.3, and 18.4 of the AD Agreement, Articles VI:1 and VI:2 of GATT 1994 and Article XVI:4 of the WTO Agreement.[283] As the Panel explained, "[d]eciding such dependent claims would provide no additional guidance as to the steps to be undertaken by the United States in order to implement our recommendation regarding the violation on which it is dependent."[284]

222. In response to comments from the EC during the interim review, the Panel reiterated that "deciding dependent claims will not provide additional guidance as to the steps to be undertaken by the United States in order to implement the Panel's recommendation regarding the violation

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[280] EC Appellant Submission, para. 368.
[281] Panel Report, paras. 7.286 and 8.1(f).
[282] Panel Report, para. 7.32.
[283] Panel Report, paras. 7.34 and 8.2.
[284] Panel Report, para. 7.34.

on which the recommendation is dependent."[285] The Panel also noted that "[t]he interim review request of the European Communities contains no argumentation that calls into question the logic of that reasoning."[286]

223. The EC's Appellant Submission likewise provides no argumentation that calls into question the propriety of the Panel's findings with respect to the assessment reviews at issue or its exercise of judicial economy with respect to the EC's dependent claims concerning the investigations as issue. Rather, the EC simply asserts that "these claims were not dependent claims."[287] In this regard, the EC has failed to file a submission that complies with the requirements of Rule 21(2) of the *Working Procedures for Appellate Review* ("*Working Procedures*").[288] Rule 21(2)(b) provides, in relevant part, that the written submission of an appellant:

> (b) [Shall] set out
>
> (i) a precise statement of the grounds for the appeal, including the specific allegations of error in the issues of law covered in the panel report and legal interpretations developed by the panel, and the legal arguments in support thereof; [and]
>
> (ii) a precise statement of the provisions of the covered agreement and other legal sources relied on [.]

224. The EC Appellant Submission does not, however, set out the required "precise statements." Instead, the EC relies on "the reasons set out in its submissions to the Panel and in

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[285] Panel Report, para. 6.6.
[286] Panel Report, para. 6.6.
[287] EC Appellant Submission, para. 368.
[288] *Working Procedures for Appellate Review* ("*Working Procedures*"), WT/AB/WP/5 (4 January 2005).

this submission."[289] While it may perhaps be possible to comply with Rule 21 through an incorporation by reference,[290] the EC certainly has not complied in this instance. In particular, the EC's reference – without citation – to its submissions to the Panel and its Appellant Submission does not even set its arguments out, let alone meet the Rule's standard of setting out a "precise" statement of the EC's legal arguments and of the provisions relied on. Leaving the Appellate Body (and the United States and the third parties) to guess which arguments in which separate documents are relevant is the exact opposite of providing a "precise statement" of those arguments in the appellant submission. Moreover, most of the submissions that the EC references were not even available to third parties. Accordingly, the Appellate Body should dismiss the EC's "other claims" due to the EC's failure to comply with the *Working Procedures*.

VII. The Appellate Body Should Reject the EC's Claim Under DSU Article 11[291]

A. The EC's Claim Was Not Properly Notified

225. Rule 20(2) of the *Working Procedures* sets forth the information requirements for a Notice of Appeal. Paragraph (d) requires that a Notice of Appeal include, *inter alia*, "an indicative list of the paragraphs of the panel report containing the alleged errors."[292] The requirement under Rule 20(2) serves the interests of due process and assists the Appellate Body and parties and third parties in understanding the issues under appeal.[293] These objectives are

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[289] EC Appellant Submission, para. 368.

[290] For example, where the submissions being incorporated clearly identify and express the precise arguments in a coherent, discrete manner.

[291] EC Appellant Submission, paras. 369-371.

[292] *Working Procedures*, Rule 20(2), paragraph (d)(iii).

[293] *See Working Procedures for Appellate Review, Communication from the Appellate Body*, WT/AB/WP/W/9 (7 October 2004), Annex A, Amendments to the *Working Procedures for Appellate Review*: Explanatory Notes, page 5 ("Content of Notice of Appeal"); *see also US - Countervailing Measures (AB)*, para. 62.

fulfilled, in part, by the requirement to identify, at a minimum, an indicative list of the paragraphs of the panel report containing the alleged errors. In relation to its DSU Article 11 claims, the EC's Notice of Appeal fails in this regard.

226. In particular, in item "(m)" of its Notice of Appeal, the EC alleges that the Panel erred by failing to make "an objective assessment of the matter before it" as required by Article 11 of the DSU.[294] However, item "(m)" did not identify any paragraph in the panel report containing this alleged error.[295] Moreover, the EC's parenthetical in item "(m)" – "(as appropriate)" – indicates that the EC is claiming that, *in some instances*, the Panel did not make an objective assessment of the facts. The EC, however, never identifies those instances. As a result, the EC's Notice of Appeal did not provide the requisite notice to the United States, third parties and the Appellate Body, as contemplated by Rule 20(2) of the *Working Procedures*, of the scope and nature of the EC's appeal under Article 11.

227. The EC's assertion in its appellant submission, that "the Panel failed to make an objective assessment of . . . the facts of the case" also runs afoul of the *Working Procedures*.[296] Specifically, the EC has not complied with Rule 21(2)(b)(i), which requires "legal arguments" in support of "specific allegations of error" on the part of the panel. The EC's appellant submission is devoid of *any* argument in support of its claim of non-objective assessment of the facts.

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[294] EC Notice of Appeal, item "(m)", page 3.

[295] In contrast, for each error alleged in items "(a)" through "(k)", the EC's Notice of Appeal did include a reference to particular paragraphs of the panel report. *See* EC Notice of Appeal, items "(a)"-"(k)", pages 2-3.

[296] EC Appellant Submission, para. 371.

228. For these reasons, the Appellate Body should decline to rule on the EC's claims regarding the Panel's compliance with DSU Article 11.[297]

B. The EC Does Not Assert a Proper Claim

229. Assuming, *arguendo*, that the EC's Article 11 claim satisfies the requirements of the *Working Procedures*, the EC has failed to demonstrate a failure on the part of the Panel to make an objective assessment of the matter before it. The allegation that a panel failed to conduct an "objective assessment of the matter before it" required by DSU Article 11 "is a very serious allegation."[298] At a minimum, an appeal under Article 11 must stand by itself and be substantiated with respect to the challenged findings. The EC's Article 11 claim fails in this regard.

230. As the Appellate Body has stated,

> A challenge under Article 11 of the DSU must not be vague or ambiguous. On the contrary, such a challenge must be clearly articulated and substantiated with specific arguments.[299]

In its appellant submission, the EC merely asserts that the Panel report demonstrates "insufficient reasoning, *or* internal inconsistency, *or* the making of a case for the US."[300] The EC's challenge does not reference a single Panel finding that evinces the asserted flaws. Nor does the EC's challenge articulate any specific arguments to substantiate its assertions. Moreover, to the extent the EC's Article 11 claim is based on "reasons outlined [elsewhere] in

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[297] *See US - Cotton Subsidies (AB)*, para. 495 (even an illustrative list of Panel findings was insufficient to provide adequate notice of a claim of error with respect to a finding described in a paragraph not specifically identified).

[298] *EC - Poultry (AB)*, para. 133.

[299] *US – Steel Safeguards (AB)*, para. 498.

[300] EC Appellant Submission, para. 370 (emphasis added).

this [appellant] submission," it runs afoul of the Appellate Body's admonition that an Article 11 claim should not be made "merely as a subsidiary argument or claim in support of a claim of a panel's failure to construe or apply correctly a particular provision of a covered agreement."[301] In other words, a claim under DSU Article 11 cannot be subsidiary to another alleged violation. The EC has not substantiated its claim that the Panel acted inconsistently with Article 11 of the DSU and, accordingly, its claim should fail.

VIII. The Panel Properly Rejected the EC's "As Such" Claims With Respect to the "Standard Zeroing Procedures"[302]

231. The EC "conditionally" appeals the Panel's findings with respect to the "Standard Zeroing Procedures in the Standard Computer Program."[303] However, the precise "condition" that could trigger further Appellate Body action is difficult to discern from the EC's submission.

232. On the one hand, the EC seems to request that the Appellate Body interpret the Panel's findings regarding the "Standard Zeroing Procedures as set out in the Standard Computer Program," decide what that interpretation means for the United States' obligations with respect to compliance, and consider whether that interpretation comports with the EC's expectations regarding compliance.[304] If the Appellate Body concludes that its interpretation does not comport with the EC's expectations, then, according to the EC, the Appellate Body should "complete the analysis" by finding that the "Standard Zeroing Procedures" is both a measure and

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[301] *US – Steel Safeguards (AB)*, para. 498.

[302] EC Appellant Submission, paras. 372-380.

[303] EC Appellant Submission, paras. 372, 374. The EC defined the "Standard AD Margin Program" as "includ[ing] the 'Standard Zeroing Procedures'." Panel Report, para. 2.6, item (d).

[304] EC Appellant Submission, para. 372.

inconsistent with multiple provisions of the covered agreements.[305] This "conditional" appeal is outside the scope of the Appellate Body's mandate under Article 17 of the DSU. The EC has failed to identify either a "legal interpretation developed by the panel" within the meaning of Article 17.6 of the DSU or a "legal finding" or "conclusion" that the Appellate Body may "uphold, modify or reverse" under Article 17.13 of the DSU.

233. On the other hand, the EC "conditionally" appeals the Panel's specific findings with respect to the "Standard Zeroing Procedures."[306] The "conditional" nature of the EC's appeal is unexplained and unsubstantiated. As the Panel stated, the "Standard Zeroing Procedures" are not "an act or instrument that sets forth rules or norms intended to have general and prospective application" because they are "only applicable in a particular anti-dumping proceeding as a result of their inclusion in the computer programme used in that particular proceeding."[307] The Panel also found that the "'Standard Zeroing Procedures' by themselves do not create anything and are simply a reflection of something else."[308] Thus, there is no question that the Panel found that the "Standard Zeroing Procedures" are not a measure. Moreover, the Panel clearly concluded that the "Standard Zeroing Procedures" are not "as such" inconsistent with any of the provisions of the covered agreements identified by the EC.[309]

234. Under these circumstances, the EC should have appealed directly the Panel's findings. Instead the EC's requests that the Appellate Body "complete the analysis by finding that the

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[305] EC Appellant Submission, paras. 372-376.
[306] EC Appellant Submission, paras. 374.
[307] Panel Report, para. 7.97.
[308] Panel Report, para. 7.97.
[309] Panel Report, paras. 8.1(g) and 8.1(h).

Standard Zeroing Procedures are a measure."[310] The EC's failure to make a direct, as opposed to "conditional" appeal, deprives the Appellate Body (and the United States and third parties) of the "precise statement of the grounds for the appeal, including the specific allegations of error in the issues of law covered in the panel report and legal interpretations developed by the panel, and the legal arguments in support therefor" required under Rule 21(2) of the *Working Procedures*. On that basis, the Appellate Body should reject the EC's "conditional" claim with respect to the "Standard Zeroing Procedures."

235. In any case, the Panel properly concluded that the "Standard Zeroing Procedures" are not a measure. In particular, the Panel correctly recognized that a measure has to do something and cannot be "simply a reflection of something else."[311] As the Panel noted, the "Standard Zeroing Procedures" are only applicable in a particular antidumping proceeding as a result of their inclusion in the computer program used in that particular proceeding. Thus, as the Panel found, "[t]he need to incorporate these lines of computer code into each individual programme indicates that it is not the "Standard Zeroing Procedures" *per se* that set forth rules or norms of general and prospective application."[312] Even assuming that the "Standard Zeroing Procedures" are a "measure," they do not preclude the Commerce decisionmaker from offsetting negative dumping margins nor do they require the Commerce decisionmaker to ignore negative dumping margins, because he/she could simply use a different set of computer instructions.[313] The Appellate Body

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[310] EC Appellant Submission, para. 374.

[311] Panel Report, para. 7.97.

[312] Panel Report, para. 7.97; *see also* U.S. First Submission, para. 91 (computer program does not set out or establish rules or norms); U.S. First Answers, paras. 93-102 (explaining the operation and nature of the computer program).

[313] U.S. First Submission, para. 92; *see also* U.S. First Answers, para. 71 (discussing mandatory/discretionary distinction); U.S. Second Submission, paras. 60-64 (computer program

should decline to modify or reverse the Panel's finding that the "Standard Zeroing Procedures" are not a measure.

236. The Appellate Body also should decline to modify or reverse the Panel's findings that the "Standard Zeroing Procedures" are not inconsistent with multiple provisions of the covered agreements.[314] The Appellate Body also should decline to disturb the Panel's exercise of judicial economy with respect to the EC's claim that the "Standard Zeroing Procedures as used by USDOC in original investigations" are inconsistent with multiple provisions of the covered agreements.[315] As the Panel properly found, "deciding such dependent claims would provide no additional guidance as to the steps to be undertaken by the United States in order to implement our recommendations regarding the violation on which it is dependent."[316]

237. The EC argues that further findings are necessary because the EC "would not be satisfied" if the United States were to implement the Panel's findings in a particular manner and/or fail to "modify" the "Standard Zeroing Procedures in the computer programme".[317] Again, the EC appears to be arguing that the Appellate Body should opine on how any potentially changed measure could be inconsistent with the WTO. However, any such measure is outside the terms of reference of this dispute – it does not exist and by definition would differ from the measure that is at issue. Neither a panel nor the Appellate Body is in a position to

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does not mandate actions).

[314] EC Appellant Submission, para. 382, citing Panel Report, paras. 8.1(g) and 8.1(h). In paragraph 382 of its Appellant Submission, the EC also cites to Panel Report, para. 8.1(c). If the EC is asking the Appellate Body to reverse the Panel's finding in paragraph 8.1(c), the United States concurs. *See* U.S. Other Appellant Submission.

[315] Panel Report, para. 8.2.

[316] Panel Report, para. 7.109.

[317] EC Appellant Submission, paras. 377 and 378.

speculate as to what form any compliance by a Member would take or to opine in the abstract on the consistency of such hypothetical measures. In this case, the Panel found that the "zeroing methodology," as it relates to investigations, is "as such" inconsistent with Article 2.4.2 of the AD Agreement.[318] This finding is sufficient to resolve the dispute as to the consistency of the methodology at issue with the covered agreements. Any further findings by the Panel would have been redundant and would not change the United States' compliance obligations. Accordingly, the Appellate Body should decline to modify or reverse the Panel's findings that the "Standard Zeroing Procedures" are not inconsistent with multiple provisions of the covered agreements cited by the EC.[319]

238. Lastly, the EC appeals the exercise of judicial economy by the Panel with respect to the "US Practice of zeroing" in investigations, assessment proceedings, new shipper reviews, changed circumstances reviews, and sunset reviews.[320] The Appellate Body should decline to rule on this claim, because the EC has failed to file a submission that complies with the requirements of Rule 21(2) of the *Working Procedures*.

239. The EC's Appellant Submission provides no argumentation that calls into question the propriety of the Panel's alleged exercise of judicial economy with respect to the "US Practice." More specifically, the EC Appellant Submission does not set out the "precise statement" of the grounds for the appeal, including the "legal argumentation in support thereof," required by

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[318] Panel Report, para. 8.1(c).

[319] EC Appellant Submission, para. 382, citing Panel Report, paras. 8.1(g) and 8.1(h). In paragraph 382 of its Appellant Submission, the EC also cites to Panel Report, para. 8.1(c). Again, if the EC is asking the Appellate Body to reverse the Panel's finding in paragraph 8.1(c), the United States concurs.

[320] EC Appellant Submission, para. 380.

Rule 21(2)(b). The EC simply alleges error on the part of the Panel without *any* argumentation or citation to arguments contained in its submissions to the Panel.[321] Leaving the Appellate Body (and the United States and the third parties) to guess at the basis for the alleged error is the exact opposite of providing a "precise statement" of those arguments. The EC has given the Appellate Body no reason to find error in the Panel's findings with respect to the Panel's alleged exercise of judicial economy with respect to "US Practice". For these reasons, the Appellate Body should decline to rule on the EC's claims regarding "US Practice".

IX. Conclusion

240. For the foregoing reasons, the United States respectfully requests that the Appellate Body affirm the findings and conclusions of the Panel listed in the EC Notice of Appeal and dismiss the EC's appeal in all respects.

[321] EC Appellant Submission, para. 380.